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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 21.

CASES ARGUED AND DETERMINED

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

AUGUST—NOVEMBER, 1884.

ROBERT DESTY, EDITOR.

SAINT PAUL:
WEST PUBLISHING COMPANY.
1884.

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OF THE
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OF THE
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² Appointed to succeed **HON. LE BARON B. COLT**, resigned to become Circuit Judge, and qualified January 2, 1885.

³ Resigned. **HON. LEONARD E. WALES**, of Delaware, appointed.

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¹Resigned. Hon. WALTER Q. GRESHAM, of Indiana, appointed.

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(Circuit Court, D. Colorado. June 23, 1884.)

1. FEDERAL COURTS—REMOVAL OF CAUSES FROM STATE COURT—SEVERAL ACTIONS BETWEEN SAME PARTIES, ETC.

In several actions for the same cause between the same parties in a court of the state, the parties may not proceed to trial in one and afterwards remove another, under the act of 1875, and have the right to try the latter in a federal court.

2. SAME—REARRANGEMENT OF PARTIES.

The act of 1875, relative to removal of causes from a state to a federal court, provides that the application for the removal must be made before or at the time at which such cause could be first tried, and before the trial thereof. After a trial, a different arrangement of the parties (or those interested in their stead) in a second suit does not so far alter the *status* of the case as to entitle the parties, or any of them, to a removal, when the subject-matter of the controversy is identical with that presented in the suit, trial upon which has already been had.

3. SAME—INJUNCTION PENDENTE LITE.

Upon an action at law to recover real property in a court of the state, a bill can be maintained in a federal court to preserve the property pending the suit at law *only* when the jurisdiction of the state court has not been invoked. If in the principal suit at law relief by way of injunction is asked for, there can be no ground upon which to ask for the same thing in the federal court.

Motion for an Injunction.

G. G. Symes and Thomas Macon, for plaintiffs.

Charles S. Thomas, for defendant.

HALLETT, J. May 11, 1883, Charles H. Smith and three others brought suit in ejectment against Cornelia C. Evans and eleven others, in the district court of Gunnison county, to recover the possession of the Eureka lode. In the same complaint they asked for an injunction, according to the usual practice in courts of the state, to restrain the defendants from working the claim pending the suit. June 12, 1883, defendants in that suit answered the complaint, denying at
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length the allegations thereof, and asserting title in themselves to a part of the said Eureka claim, under another and an earlier location owned by them, and called the Nest Egg. On the twenty-eighth day of June, 1883, plaintiffs replied to the answer of defendants, and the cause was at issue. Both parties were enjoined from working certain parts of the ground in dispute, and various orders were made in the case during the year 1883, relating to the examination and possession of the claims. March 18, 1884, the cause came on for trial in the district court, and the plaintiffs obtained a verdict, upon which, after motion for a new trial, judgment was entered. Defendants have paid the costs of that trial, pursuant to section 254 of the Code, the judgment has been vacated, and the cause now stands for trial again, according to the provisions of that section.

After this suit was brought, and in the month of October, 1883, the plaintiffs applied for a patent to the Eureka lode. Three of the defendants in that suit, Cornelia C. Evans, Charles L. Perkins, and Frank C. Goudy, together with Edwin H. Hiller and Wilson Hallock, who then owned the Nest Egg location, made adverse claim in the land-office to a portion of the said Eureka claim, being the ground in contest between the Eureka and Nest Egg locations, as described in the before-mentioned suit of May 11, 1883. As provided in section 2326 of the Revised Statutes, the parties last named, on the tenth day of November, 1883, brought suit in the said district court of Gunnison county in support of their adverse claim against the plaintiffs in the first-mentioned suit. Three defendants in that suit, Hess, Pierce, and Steward, were served with summons, November 19th, and on the thirtieth of the same month they answered the complaint in the cause, denying the allegations thereof, and averring that they had parted with their interests in the Eureka claim, and disclaiming all interest therein. February 4, 1884, plaintiffs replied to this answer, and the replication was withdrawn May 26, 1884. On the same twenty-sixth of May, upon plaintiffs' request, the clerk of the district court entered an order dismissing the cause as to the said Hess, Pierce, and Steward. It does not appear that service was ever made upon the remaining defendant, Charles H. Smith. He appeared in the cause, March 31, 1884, and was allowed 10 days to plead to the complaint. This time was afterwards extended 30 days from April 5, 1884. May 5, 1884, he filed a general demurrer to the complaint, which has not been disposed of. May 27, 1884, in vacation, plaintiffs applied to the district judge, upon petition, to remove the cause into the circuit court of the United States, on the ground that there was a controversy between citizens of different states, under the act of 1875; some of the plaintiffs being citizens of the state of Colorado, and one a citizen of the state of New York, and defendant a citizen of the state of Iowa. An order allowing the removal was made by the district judge, and a transcript of the record was filed in this court, June 2, 1884. The bill of complaint on which the application for in-

junction is based is filed in this court by the plaintiffs in the last-mentioned law action, against the defendant therein, to restrain the latter from working and mining on the Eureka claim during the pendency of the law action. Its object is to preserve the property until the title to the claim can be tried at law. No question affecting the ultimate rights of the parties can be determined in it. The relief sought by the bill was once allowed and afterwards denied by the district court of Gunnison county, in the suit of May 11, 1883, which is still pending in that court. In this suit, therefore, the plaintiffs' right to relief must depend upon the right to prosecute the principal cause at law in this court, which was removed from the district court of Gunnison county, as before stated. Between May 11, 1883, when the first suit at law was brought, and November 1, 1883, when the second suit at law was brought, changes occurred in the ownership of the property: three of the plaintiffs in the first suit, Hess, Pierce, and Steward, conveyed their interests in the Eureka claim to the remaining plaintiff, Charles H. Smith, and nine of the defendants in the same suit retired from the Nest Egg claim, and Edwin H. Hiller and Nelson Hallock acquired some interest in it. Notwithstanding these changes in the ownership of the property, the second suit is a cross-action to the first, which adds nothing to the controversy.

As before stated, defendant in the first suit set up title to the ground in dispute under the Nest Egg location, and asked for affirmative relief. The second suit, brought by the same defendants and those claiming under them, presented only a different arrangement of the parties, without change in the subject-matter of the action. The object of each suit was the same, and a judgment in either would bar all further proceedings in the other. When two suits are brought for the same thing, the court may require the parties to elect in which they will proceed, or may consolidate them. By section 20 of the Code, suits upon causes of action which might have been joined may be consolidated, and several actions for the same cause must be subject to the same rule. And where there are several actions for the same cause pending in the same court at the same time, any step taken in one of them should bind the parties in all of them. The court is certainly not bound to proceed in the same manner and with the like results in every such cause. To illustrate this proposition, a trial having been had in the district court in the suit of May 11, 1883, the court was not bound to proceed to try the same issue in the suit of November 10, 1883. Inasmuch as a judgment in one would bar the other, the causes must be taken to be so identified that whatever was done in one of them will conclude the parties on the same point in the other. In other words, although the causes were not consolidated, and there was no election of record to prosecute one rather than the other, proceeding in one was attended with the same results as if such order had been made. The circumstance that the suit of November 10, 1883, is in support of an adverse claim does not affect the question.

It may be that upon discontinuing the prior suit the plaintiffs in that suit would have been entitled to proceed to judgment in it; or, with the consent of the court, the suit of November 10, 1883, could have been carried on in preference to the other. But the parties having elected to try the case of May 11, 1883, had no right to demand a trial in the second suit on the same issue. The act of 1875, under which the suit of November 10, 1883, was removed into this court, provides that the application for removal shall be made "before or at the term at which said cause could be first tried, and before the trial thereof;" and, that cause being affected with the proceedings in the prior suit of May 11, 1883, in which a trial was had before the application was made, it must be said that the petition to remove was not filed in due time.

By the answer of Hess, Pierce, and Steward, in the suit of November 10, 1883, which was filed November 30, 1883, plaintiffs were advised that those parties had disposed of their interest in the Eureka claim. It was then practicable to make the parties to the suit of May 11, 1883, as they were subsequently made in the suit of November 10, 1883, and to establish the right of removal in both suits if any could exist. To proceed to trial in either cause after that date, was a waiver of the right to remove the other under the act of 1875. Any other rule would enable the parties to try their fortunes in the district court of the state, and if the result should be unsatisfactory to renew the contest in this court.

The suggestion that a suit may be prosecuted in the state court and in a federal court at the same time and for the same cause, would be worthy of consideration if the suit of November 10, 1883, had been brought in this court; but such is not the fact. And the question is, not whether the pendency of another suit for the same cause in a court of the state will abate an action in this court. We are now considering whether, in several actions for the same cause between the same parties in a court of the state, the parties may proceed to trial in one, and afterwards remove another under the act of 1875, and have the right to try the latter in the federal court. That question must be answered in the negative.

It was suggested, also, that upon an action at law to recover real property in a court of the state a bill can be maintained in this court to preserve the property pending the suit at law; but that rule is applicable only when the jurisdiction of the state court has not been invoked. If, in the principal suit at law, relief by way of injunction is asked for, there can be no ground upon which to ask for the same thing in this court. Before the application to remove the suit of November 10, 1883, was made in the district court of the state, all matters in controversy between the parties had been tried, and once determined in that court, and the right of removal no longer existed.

The suit of November 10, 1883, was improperly removed to this court, and the motion for injunction will be denied.

LAMB v. FARRELL.

(Circuit Court, E. D. Arkansas. April Term, 1884.)

1. REMOVAL OF CLOUDS FROM TITLE—RULE IN ARKANSAS.

It is the established doctrine of the supreme court of Arkansas that a court of equity has jurisdiction of a suit to remove a cloud from title to land when the claim or lien which constitutes the cloud purports on its face to be valid, and the defect in it can be made to appear only by extrinsic evidence, and there is no adequate remedy at law. In the application of this rule, that court holds the jurisdiction exists when the plaintiff is the holder of the legal title and in possession, or the land is unoccupied; and that when the plaintiff's title is equitable, or a junior legal title with prior or superior equities, the jurisdiction exists without regard to the question of possession.

2. STATE DECISIONS—FEDERAL COURTS FOLLOW, WHEN.

Where the decisions of the supreme court of a state on the subject of titles to land, or the mode of acquiring or quieting titles thereto, are settled and uniform, they are accepted by the federal courts as conclusive evidence of the law of the state on that subject, and have a binding force as nearly equivalent to a positive statute as judicial decisions can have.

3. SAME—STATE STATUTES AND STATE DECISIONS.

State statutes relating to the removal of clouds from title to land are obligatory upon the federal courts, and a uniform and stable body of judicial decisions on that subject, from the court of last resort of the state, is equally obligatory.

4. WHEN EQUITY HAS JURISDICTION TO REMOVE CLOUD.

"Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interests, and he cannot immediately protect or maintain his rights by any course of proceeding at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require."

5. SAME—STATUTE NOT NECESSARY.

It is highly probable some of the statutes assuming to confer on courts of equity jurisdiction to remove clouds from title had their origin in a misconception of the inherent jurisdiction of such courts. They do not confer a more extensive remedy than exists by virtue of the customary jurisdiction of chancery courts. They may regulate the mode of proceeding and form of decree, but they are not necessary to the exercise of the jurisdiction.

6. ORTON v. SMITH, 18 How. 263.

The case of *Orton v. Smith*, 18 How. 263, examined, and shown not to decide anything contrary to the principles here announced.

7. TAX DEED—ITS VALUE AS EVIDENCE.

In Arkansas a tax deed is *prima facie* evidence of the regularity of the tax proceedings leading up to the deed. The act declaring the deed should be conclusive evidence of the regularity of the previous proceedings. was held to be unconstitutional by the supreme court of the state.

8. WARRANT TO COLLECT TAX—ASSESSOR'S OATH.

The failure of the assessor to authenticate the assessment roll by his oath, as required by law, and the fact that no warrant for the collection of the tax was issued to the collector by the clerk, as required by law, are irregularities that vitiate the tax sale and deed.

9. RIGHTS OF PURCHASER AT A VOID TAX SALE.

In Arkansas the purchaser of land at a void tax sale may recover the taxes, interest, penalty, and costs of advertising charged on the land at the time of sale, and all subsequent taxes paid by him, with interest, and the statute creates a lien on the land in his favor for these amounts.

In Equity.

John M. Moore, for plaintiff.

Clark & Williams, for defendant.

CALDWELL, J. This is a suit in equity to remove a cloud from the plaintiff's title to the real estate described in the bill. The bill alleges that the plaintiff is the owner in fee-simple of the land; sets forth how he acquired it, and exhibits his muniments of title; alleges that the land is unoccupied; that the defendant claims title by virtue of a deed from the state land commissioner, which invests him with the apparent legal title, but that, in fact, said deed conveyed no title, the state having none to convey; that the only pretense of claim the state had to the land was that it was struck off to the state at the sale of delinquent lands for the taxes of 1876 in the county of Saline, and that, at the expiration of the time allowed by law for the redemption of lands sold for taxes, the clerk of said county executed a deed to the state; that the said tax sale, and the deed made to the state in pursuance thereof, are void, because the assessor of said county, for the year 1876, did not, at the time he returned his assessment to the clerk, nor at any time, take and subscribe the oath required by section 5112, Gantt, Dig.; and because the clerk of the county, at the time he made out and delivered the tax-book of the county, for said year, to the collector, did not attach thereto "under his hand and the seal of his office," his warrant authorizing said collector to collect such taxes as required by section 5139, Gantt, Dig., and that no warrant was issued to the collector at any time, or in any form, authorizing him to collect the taxes of that year. The bill contains the usual allegations as to the injurious effects of this cloud upon the plaintiff's title, and an appropriate prayer for relief. The proof supports the allegations of the bill, leaving only questions of law to be determined.

The first contention of the defendant is that courts of equity have no jurisdiction to entertain a bill to remove a cloud from title at the suit of the holder of the legal title, unless he is in actual possession of the land. It is the established doctrine of the supreme court of this state that a court of equity has jurisdiction of a suit to remove a cloud from title to land when the claim or lien which constitutes the cloud purports on its face to be valid, and the defect in it can be made to appear only by extrinsic evidence, and there is no adequate remedy at law.

In the application of the principle thus generally stated, that court holds the jurisdiction exists when the plaintiff is the holder of the legal title and in the possession of the land, or the land is unoccupied, and that when the plaintiff's title is equitable, or a junior legal title with prior and superior equities, the jurisdiction exists without regard to the question of occupation or possession. *Mitchell v. Etter*, 22 Ark. 178; *Apperson v. Ford*, 23 Ark. 746; *Branch v. Mitchell*, 24 Ark. 431; *Byers v. Danley*, 27 Ark. 77, 96; *Miller v. Neiman*, Id. 233; *Chaplin v. Holmes*, Id. 414; *Sale v. McLean*, 29

Ark. 612; *Terry v. Rosell*, 32 Ark. 478, 490; *Hare v. Carnall*, 39 Ark. 196, 202; *Lawrence v. Zimpleman*, 37 Ark. 643. Expressions may be found in some of these cases which, taken alone, might indicate the jurisdiction was not quite so extended. But the utterances of every court must be read in the light of the facts of the case which it is deciding.

In *Apperson v. Ford*, *supra*, a single judge expressed the opinion "that the jurisdiction is exercised to strengthen and protect the title that is connected with actual possession," but a majority of the court did not concur in this view; and in the later case of *Branch v. Mitchell*, *supra*, the court, upon full consideration of the question, held that "where one holding the equitable title only to lands, or a junior legal title with prior or superior equities, comes into a court of equity to impeach and cancel, or compel a conveyance, of the senior or better *legal* title, the jurisdiction of the court in nowise depends on the question of possession." The reasoning of the court in support of this proposition would seem to be unanswerable: "Whether one holding a junior or inferior legal title with prior or superior equities be in or out of possession, it is difficult to conceive on what grounds his right to the aid of a court of equity can be denied. If *in* possession, he may be ousted by an ejectment; if *out*, he cannot obtain possession when confronted by the only or the older and better legal title. If *in* possession, he cannot bring ejectment; *out*, he cannot maintain it."

Notwithstanding the language of the learned judge who delivered the opinion of the court in *Apperson v. Ford*, that this jurisdiction is exercised "to protect the title that is connected with actual possession," it is obvious he did not mean to assert that possession was essential to the jurisdiction in every case, because later on in the opinion he concedes the jurisdiction where neither party is in possession. He says, (p. 762:)

"Taking neither party in *Mitchell v. Etter* to have been in possession, then Mitchell and wife were without remedy at law, and without any means to test the opposing title of the defendants, but by complaining of it in chancery, as a cloud upon their title, and that fact alone would give jurisdiction. *Mattingly's Heirs v. Corbit*, 7 B. Mon. 376."

And this doctrine has been uniformly maintained by the court.

In *Shell v. Martin*, 19 Ark. 139, a bill was sustained by the holder of the legal title out of possession against a defendant in possession claiming under an alleged legal title. On these facts, it is obvious the plaintiff had an adequate remedy at law; and, upon that ground, *Shell v. Martin* has been overruled by the later cases.

The state, as well as the owners, has an interest that the title to lands within her borders should be quieted. Doubtful or clouded titles prevent the sale, lessen the value, and retard the occupation and improvement of lands; and the additional public revenue which would be derived from their improvement and enhanced value is lost.

It has been the settled policy of this state to render titles secure, and to afford ample means of settling all disputes in relation to them. This policy finds expression in statutes of limitations, betterment acts, and acts curing defective acknowledgments; and in the judgments of the supreme court, expounding the jurisdiction of courts of equity to quiet titles, and to avert and remove clouds from titles. No statute has been passed in this state relating to the jurisdiction or practice of equity courts in cases like the one at bar, because the supreme court has steadily maintained that the jurisdiction was inherent, and the rules of practice adequate, without the aid of legislation. The federal courts have given effect to such statutes in other states. *Clark v. Smith*, 13 Pet. 195; *Stark v. Starrs*, 6 Wall. 402; *Holland v. Challen*, 110 U. S. 15; S. C. 3 Sup. Ct. Rep. 495.

The defendant insists that a court of equity has no inherent jurisdiction to remove clouds from title when the land is unoccupied. It is said such jurisdiction might be conferred by statute. It is conceded the federal court would give effect to such a statute, but it is denied that the settled rulings of the supreme court of a state maintaining the jurisdiction are equivalent to a statute conferring it, or that they are controlling in this court. Where the decisions of the supreme court of a state on the subject of titles to land, or the mode of acquiring or quieting titles thereto, are settled and uniform, they are accepted by the federal courts as conclusive evidence of the law of the state on that subject, and have a binding force as nearly equivalent to a positive statute as judicial decisions can have.

In a suit involving title to land, where the supreme court of the state had adopted a rule of decision applicable to the case, the supreme court of the United States said:

"In accordance with well-established principles in this court, we accept this uniform and stable body of judicial decision from the court of last resort of the state in which the property is situated, and in which the transactions that form the subject of this litigation took place, as conclusive testimony of the rule of action prescribed by the authorities of the state, as applicable to their interpretation and adjustment. We do not inquire whether a more suitable rule might not have been adopted, nor whether the arguments which led to its adoption were forcible or just. We receive the decision, having the character that are mentioned in the extract we have made from the opinion of the supreme court of Texas, as having a binding force almost equivalent to positive law." *League v. Egery*, 24 How. 264; *Christy v. Pridgeon*, 4 Wall. 196, 204; *Beauregard v. City of New Orleans*, 18 How 497

In *Clark v. Smith*, *supra*, the court say:

"Propriety and convenience suggest that the practice should not materially differ where the titles to land are the subject of investigation; and such is the constant course of the federal courts."

And in the same case it is said the federal courts in chancery will give effect to state legislation and state policy whenever it can be done without departing from what legitimately belongs to a court of chancery. But I do not rest the case on this ground alone. The

decisions of the supreme court of this state on this question are right in principle.

The action at law for the recovery of real property retains its possessory feature in this state and can only be brought against the person in possession. *Ozark Land Co. v. Leonard*, 20 FED. REP. 881.

All the authorities agree that equity has jurisdiction of a suit to quiet the title, or remove a cloud from the title, of one in actual possession, whether his title be legal or equitable; and the courts are all agreed as to the ground of this jurisdiction. It attaches because the remedy at law is inadequate. The law will lend its aid to those holding the legal title, and out of possession, to assail those who are in possession. But it will not aid one in possession, whether his title be legal or equitable; nor will it aid him, though out of possession, if his title be equitable, or the land unoccupied. Where the plaintiff is in possession, recourse is had to equity, not because there is some mysterious virtue in the fact of possession of property that clothes the possessor with the special privilege of having the controversies in relation thereto tried in equity, but because he has no means of procuring the controversy to be tried at law. If a statute should be passed authorizing one in possession of land to bring a suit at law, against any one claiming it, to settle the title, "the jurisdiction in equity, if it did not cease as unwarranted, would, at least, become inoperative and obsolete." *Ex parte Boyd*, 105 U. S. 647, 657. The possession would be in the plaintiff as before, but the essential element to give equity jurisdiction—the want of a remedy at law—would no longer exist.

In the case of unoccupied land, the law refuses its aid to any party for any purpose. It will not adjudicate the title or right of possession, nor will it remove a cloud. Whether one's title be legal or equitable, he is equally denied relief or redress at law, when the land is unoccupied. The want of an adequate remedy at law is as absolute as it is when the plaintiff has the actual possession. A large proportion of the valuable lands of this county are unoccupied. In some instances lands having great value for some purposes are not even susceptible of occupation. Owners and purchasers are not indifferent about the title to such lands. A cloud upon the title to unoccupied land is not less injurious to the owner than it would be if he was in possession; and the ground of his equity to have his title quieted and clouds removed is precisely that upon which jurisdiction is assumed and relief granted to owners in possession of their lands, viz., the law's inability to afford him a remedy.

Equity courts had their origin in the blind and obstinate refusal of the early common-law courts to expound their rules of decision and mould their forms of procedure to meet the growing exigencies of society, and the obvious demands of justice. Courts of equity in this country should not imitate the bad example of the common-law courts, and decline jurisdiction in suits falling clearly within the ac-

knowledge and fundamental principle upon which equity jurisdiction is founded, because there seems to have been no case calling for its exercise under a system of tenures, a rule of seizin, and forms of procedure now obsolete in the country of their creation, and which never had any place in the laws of this country. The jurisdiction and practice in the equity courts of the United States has a general correspondence with that of the chancery courts of England. But chancery jurisdiction and practice, like the common law, is subject to be modified by local circumstances, or local convenience and necessity. The altered condition of society and government demands corresponding changes in our jurisprudence. Law, like everything else, is subject to the law of evolution. The conservatism of courts is a guaranty that the process will not go forward more rapidly than experience and the plainest principles of right and justice imperatively demand.

In answer to the argument that the subject-matter of a proceeding at law in a federal court, founded on a state statute, was originally exclusively cognizable in equity, and therefore could not be changed into a proceeding at law, the supreme court of the United States, speaking by Mr. Justice MATTHEWS, said:

"And the remaining question, therefore, becomes, not so much whether congress may, by appropriate legislation, transmute an equitable into a legal procedure, as whether it can in anywise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the constitution, or whether, by the adoption of that instrument, all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it." *Ex parte Boyd*, 105 U. S. 647, 656.

And see, to same effect, *Ellis v. Davis*, 109 U. S. 485, 497; S. C. 3 Sup. Ct. Rep. 327.

But the case at bar falls plainly within the first and most ancient principle of equity jurisdiction. No extension or expansion of that jurisdiction is necessary to uphold it.

In *Holland v. Challen*, 110 U. S. 15, S. C. 3 Sup. Ct. Rep. 495, Mr. Justice FIELD, speaking for the whole court, said:

"The truth is that the jurisdiction to relieve the holders of real property from vexatious claims to it, casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity.
* * *

It is true, that case was founded on a statute of Nebraska, but the reasoning of the court in support of the jurisdiction under the statute, supports it equally independently of the statute. The court say:

"The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild, and uncultivated land. Few persons would be willing to take possession of such land, inclose, cultivate, and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party

claiming ownership is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes like the one of Nebraska have been passed by several states, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the states should not be enforced by the federal courts, when the controversy to which it may give rise is between citizens of different states. * * * There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. * * * Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will properly rest with the court. * * * But should proofs of a different character be produced, the controversy would still be one upon which a court of law could not act. It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

The principle is said to be somewhat analogous to the jurisdiction entertained by courts of equity to compel a person having a *prima facie* right of action to put it in suit in a reasonable time, and in default to protect the party liable from being molested at law. Spence, Eq. Jur. [659.] note 9.

"The jurisdiction of a court of equity to set aside deeds and other legal instruments which are a cloud upon the title of real estate, and to order them to be delivered up and canceled, appears to be now fully established." Willard, Eq. Jur. 304.

A terse and comprehensive statement of the principle upon which the jurisdiction is founded, is contained in *Marsh v. City of Brooklyn*, 59 N. Y. 280. Judge FOLGER, delivering the opinion of the court, said:

"When the claim or lien purports to affect real estate, and appears on its face to be valid, when the defect in it can be made to appear only by extrinsic evidence, which will not necessarily appear in a proceeding by the claimant thereof to enforce the lien, there is a case presented for invoking the aid of a court of equity, and to remove the lien which is a cloud upon the title."

Mr. Pomeroy, in his valuable treatise on Equity Jurisprudence, lays it down that courts of equity have jurisdiction to remove clouds from title where the title to be protected is equitable in its nature, or where the title is legal and the remedy at law is inadequate, (section 1399;) and in a note to this section the learned author shows the statement of the text is supported by the general, though not quite uniform, doctrine of the authorities in this country. On the precise question in the case at bar he says:

"Where, on the other hand, a party out of possession has an equitable title, or where he holds the legal title under circumstances, that the law cannot

furnish him full and complete relief, his resort to equity to have a cloud removed ought not to be questioned."

The principle on which the jurisdiction is founded, and the rule for its exercise, are admirably stated in *Martin v. Graves*, 5 Allen, 601, where the court say:

"Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interests, and he cannot immediately protect or maintain his right by any course of proceeding at law, a court of equity will afford relief by directing the instruments to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require."

In *Clouston v. Shearer*, 99 Mass. 209, it is said:

"This is a broad and comprehensive statement of the principles on which such relief is granted."

And the latter case is cited approvingly in *Sullivan v. Finnegan*, 101 Mass. 447, and the rule applied where the plaintiff and defendant were occupying different rooms in the same house, each claiming to own the whole; and see *Loring v. Downer*, 1 McAll. 360; *Bunce v. Gallagher*, 5 Blatchf. 481; S. C. 7 Amer. Law Reg. (N. S.) 35; *Young v. Porter*, 3 Woods, 342; *Carroll v. Safford*, 441, 464.

Some of the confusion and apparent conflict in the authorities grows out of the varying provisions of state statutes. Decisions based on statutes are cited as though they were an exposition of the general principles of equity jurisdiction. It is highly probable some of these statutes had their origin in a misconception of the inherent jurisdiction and powers of courts of equity. The tendency of the courts at first was to accept these statutes as the measure of equity jurisdiction in this class of cases.

The case of *Pier v. City of Fond du Lac*, 38 Wis. 470, is instructive on this point. That was a suit in equity to remove a cloud cast upon the plaintiff's title by a certificate of assessment. The bill alleged the plaintiff was the owner in fee of the lot, but said nothing about the possession. The bill being silent on the question of possession, the court assumed, for the purposes of the case, that the lot was unoccupied. It was contended for the defendant that the action could only be sustained under the statute, which is as follows:

"Any person having the possession and legal title to land may institute an action against any other person setting up a claim thereto, and if the plaintiff shall be able to substantiate his title to such land, the defendant shall be adjudged to release to the plaintiff all claim thereto, and to pay costs, unless," etc. Rev. St. 1849, § 34, c. 84; Rev. St. 1858, § 29, c. 141.

It was conceded that if the suit could not be maintained independently of the statute, the plaintiff's want of possession was fatal to his case; and the court said:

"Hence we must determine whether the action can be upheld independently of the statute. Courts of equity have inherent jurisdiction of actions to prevent or remove clouds on title to land, and have constantly exercised it

from a very early period. * * * In those actions *quia timet* which may be brought independently of the statute, we find no authority for holding that possession by the plaintiff is essential to the cause of action; and unless an averment of such possession is necessary to show that the plaintiff has no adequate remedy at law, no valid reason is perceived why it should be required. True, it is said in the opinion of Chief Justice Dixon, in *Lee v. Simpson, supra*, [29 Wis. 333,] that 'it is only the person having the possession and legal title to land who may institute his suit *quia timet* in equity against any other person setting up a claim of title thereto,' (page 337;) but the learned chief justice is there speaking of an action under the statute, and his remarks have no application to those actions *quia timet* which may be brought independently of the statute." And see *Clouston v. Shearer*, 99 Mass. 209.

And the court held that the statute could not be construed as taking away or restricting the inherent jurisdiction of courts of equity to remove clouds upon the title of unoccupied land.

It is apparent, therefore, that this and other like statutes do not confer a more extensive remedy than exists by virtue of the customary jurisdiction of the chancery courts. They may regulate the mode of proceeding and form of decree, but they are not necessary to the exercise of the jurisdiction.

A short sentence in the opinion of the court in the case of *Orton v. Smith*, 18 How. 263, is cited as supporting the proposition that equity has no jurisdiction to remove a cloud from title except at the suit of one who holds the legal and equitable title and has the possession. The case is cited in support of this proposition by counsel, and in the late case of *Patrick v. Isenhardt*, 20 FED. REP. 339, and other cases. This is a total misconception of what was before the court in that case for decision, and what was actually decided. At the threshold of the opinion the court say: "The bill in this case is in the nature of a bill of peace, as authorized by the statute of Wisconsin." The statute is not given, but it is the same that came under discussion in the case of *Pier v. Fond du Lac, supra*. *Orton v. Smith* was decided in 1855, and *Pier v. Fond du Lac* in 1875, but the same statute was in force at both periods. It will be observed that in proceeding under that statute the plaintiff must have both "the possession and the legal title." It does not appear who, if any one, was in possession of the land, but as it is said the suit was founded on the statute, it is highly probable the plaintiff was. However this may be, it is obvious that the question of possession, as affecting the jurisdiction of the court under the statute, or independently of it, was not raised or considered. Orton, the defendant in the suit below, had in good faith paid \$2,100 for a title bond to the land executed by Knab, who held the legal title. One Hubbard claimed a secret equity in the land, of which Orton had no knowledge. On the twenty-sixth of August, 1851, Orton filed his bill in chancery, in the state court, against Knab, demanding from him a conveyance of the legal title according to the exigency of his bond. During the pendency of this bill, Smith purchased, for a nominal consideration, the

real or supposed secret equity of Hubbard, and also obtained from Knab, for a like consideration, a transfer of the legal title, and thereupon filed his bill against Orton in the federal court, under the Wisconsin statute, to quiet his title. While Smith was the holder of the legal and equitable title to the land, he had acquired this title for a mere nominal consideration, while Orton's suit against Knab in the state court, for specific performance of the covenants to the latter's bond, was pending. Having reference to these facts, and touching a title so acquired, the court said:

"Those only who have a clear, legal, and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title. The complainant in this case is the volunteer purchaser of a litigious claim; he is the assignee of a secret equity for apparently a mere nominal consideration, and of the bare legal title for a like consideration. This legal title was improperly assigned to him, during the pendency of a suit in chancery to ascertain the person justly entitled to it."

The manifest sense of the opinion, when read in the light of these facts, is that there was such a want of consideration, conscience, and good faith in the acquisition of Smith's title, that a court of equity would not lend him its aid against a *bona fide* purchaser for value of an equitable title. The question of possession was not mooted. The word occurs but once in the opinion, and then casually. There was no fact or issue in the case making it necessary or proper to decide whether the jurisdiction in equity, independently of any statute, to remove a cloud from title is restricted to those only who have a clear, legal, and equitable title, and actual possession of the land. This is made clear by the fact that the court, in enumerating the defects and weaknesses in the plaintiff's case, does not mention want of possession as one of them. On the facts of the case the court refused to treat the plaintiff as the *bona fide* owner of the legal or equitable title. The court say he acquired his title without any valuable consideration, and that the "legal title was improperly assigned to him during the pendency of a suit in chancery to ascertain the person justly entitled to it." These findings were fatal to the plaintiff's case. It was upon these grounds, and the further ground that a court of the United States should not entertain a bill of peace upon a title already in litigation in a state court, that the case was decided and the bill dismissed.

What is said by the court in *Branch v. Mitchell*, *supra*, is appropriate here:

"The language of the court is always to be understood by applying it to the facts of the case decided. That which seems to be general and of universal application, has, in reality, often a limited application; and so the words of truth and the utterances of the law, undeniable in the case wherein they are spoken, become the parents of error and false doctrine."

It is next objected that section 5206 of Gantt's Digest declares that tax deeds shall be "conclusive evidence" of the regularity of every-

thing required to be done by law to make a valid tax sale; and that it is not, therefore, open to the plaintiff to prove the irregularities relied on to invalidate the sale. But the supreme court of the state has held that provision of the statute unconstitutional, and decided that the deed is only *prima facie* evidence that the necessary steps were taken to make a valid sale. *Cairo & F. R. Co. v. Parks*, 32 Ark. 131; *Hickman v. Kempner*, 35 Ark. 505. The fact that no warrant was issued to the collector authorizing him to collect the taxes, as required by section 5139, is fatal to the tax title. *Cooley, Tax'n*, 292, and cases cited. The failure of the assessor to authenticate his assessment roll by the oath required by section 5112, is also fatal to the validity of the tax sale. *Cooley, Tax'n*, 289, and cases cited; *Burroughs, Tax'n*, 232, 249, 250. Irregularities less serious than either of these have been held to avoid tax sales in this state. *Hickman v. Kempner, supra*; *Hare v. Carnall*, 39 Ark. 196; *Crane v. Randolph*, 30 Ark. 579; *Pack v. Crawford*, 29 Ark. 489; *Vernon v. Nelson*, 33 Ark. 748.

It is objected that the plaintiff did not tender to the defendant the taxes paid by him, with penalties, etc., and make affidavit of that fact, as required by section 2267 of Gantt's Digest, before bringing his suit. That section has no application to suits like the one at bar. *Chaplin v. Holmes, supra*; *Hare v. Carnall*, 39 Ark. 196, 203.

The provisions of section 5214 of Gantt's Digest are applicable to this case, and the defendant is entitled to recover in this suit the taxes, interest, penalty, and costs of advertising charged on the land at the time of the sale, and all subsequent taxes paid by her, with interest, and to have a lien decreed on the land for the same. *Hunt v. Curry*, 37 Ark. 100.

As to the equities of a purchaser at a tax sale, independently of the statute, see *Hickman v. Kempner*, 35 Ark. 505, 510; *Hare v. Carnall*, 39 Ark. 196, 203; *Ware v. Woodall*, 40 Ark. 42; *Chaffe v. Oliver*, 39 Ark. 531.

CLAPP and others v. DITTMAN and others.¹

PERRY and others v. CORBY and another.¹

(Circuit Court, E. D. Missouri. July 25, 1884.)

1. GENERAL ASSIGNMENT BY INSOLVENT DEBTOR — REV. ST. MO. § 854, CONSTRUED.

Where an insolvent debtor transfers all his property to a single creditor, under such circumstances that it is obvious that there is no intention of merely giving security, the transfer will be treated as an assignment in trust for the benefit of all his creditors, within the provisions of section 354 of the Revised Statutes of Missouri, regardless of the form of the instrument.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

2. SAME—POWER OF FEDERAL COURTS UNDER STATE STATUTE—PROCEDURE.

Federal courts have authority to take possession of property so assigned, and dispose of it in accordance with the provisions of the state statute; and where a form of procedure is prescribed by the state statute, which may be pursued by the state courts of general jurisdiction, it may also be pursued in the corresponding federal courts.

3. SAME—REDUCTION OF CLAIM TO JUDGMENT UNNECESSARY.

It is not necessary in such cases, to entitle a creditor to equitable relief in a federal court, that he should reduce his claim to judgment.

In Equity. Demurrers to bills.

Both bills allege an assignment by an insolvent debtor of all his assets to a single creditor, with the purpose of giving the assignee an undue preference over other creditors, and of hindering, delaying, and defrauding the latter. In the first case, the assignment was in the form of a chattel mortgage, but was not, it is alleged, intended to operate as such, but as an assignment. The complainants seek to have said conveyances declared assignments for the benefit of all creditors, within the meaning of section 354 of the Revised Statutes of Missouri, which provides that "every voluntary assignment of lands, tenements, goods, chattels, effects, and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims."

G. Porter, W. D. Anderson, and McKeighan & Jones, for complainants in the first case; and *Mills & Fletcher*, for complainants in the second.

Hugo Muench, for defendants in the first case. *John D. Johnson and Smith P. Galt*, for defendants in the second.

BREWER, J. These cases were argued together. Both stand on demurrer to the bill. Both involve the same questions, and will therefore be disposed of by the same opinion. In them are presented three questions:

First. Where a debtor who is insolvent transfers all his property to a single party, and under such circumstances that it is obvious that there was no intention of merely giving security, and with the idea of paying the debt and reclaiming the property, must such transfer, no matter by what form of instrument, whether that of a chattel mortgage or otherwise, and whether made to the creditor directly or to a trustee, be treated as a general assignment, and for the benefit of all creditors? This question was fully considered by this court in the case of *Martin v. Hausman*, 14 FED. REP. 160, and after a full examination of the statutes of Missouri and the decisions of its supreme court, it was answered in the affirmative. The opinion in that case was written by Judge KREKEL, and was concurred in by my predecessor, Judge McCRARY. That opinion was followed in *Dahlman v. Jacobs*, 15 FED. REP. 863, in *Kellogg v. Richardson*, an unreported case in the Western district, and also, I am informed, in other cases in this court, as well as in some of the district courts of

the state. While, if this was a new question, I confess my own conclusions would be different, and in harmony with the decisions of *Nat. Bank v. Sprague*, 20 N. J. Eq. 28; *Farwell v. Howard*, 26 Iowa, 381; *Doremus v. O'Harra*, 1 Ohio St. 45; *Atkinson v. Tomlinson*, Id. 241; and other cases cited by counsel for defendants; yet I think there has been such a course of decision in this circuit as to establish the rule in the United States courts for this state in accordance with the opinion in *Martin v. Hausman*, *supra*, and until there be some authoritative construction of the statute by the supreme court of the United States, or of the state, I shall follow the rule laid down as above. I feel the more constrained to do this, as such a construction, securing an equal distribution of the property of an insolvent among all his creditors, is manifestly most just and equitable.

Second. It is insisted that if this instrument is to be treated as a general assignment under the statute for the benefit of all creditors, the state courts have exclusive jurisdiction; and that the remedy of the plaintiff was by citing the supposed assignee to appear in the state courts and distribute the property among all the creditors in accordance with that statute. This claim cannot be sustained. The mere fact that rights are created by virtue of a state statute, and proceedings made for the enforcement of those rights in the courts of the state, does not prevent a foreign creditor from asserting the same rights in the courts of the United States. The question here is not whether the federal courts can take possession of property already in the custody of the state courts, or whether they can supersede or interfere with any action of the latter, but whether, no action having been taken in the latter, the federal courts are without jurisdiction to enforce rights under the statutes of the state, and for which a special mode of procedure is prescribed. It must be borne in mind that the rights asserted in these cases are not wholly statutory. The transfer of property by assignment, bill of sale, or mortgage is a common-law right, and the statute only prescribes the effect of such a transfer by an insolvent; it does not create, but only regulates, the right. It is like that legislation which determines, as between the mortgagor and mortgagee, the right of possession, or which requires notice to give validity as against subsequent purchasers. So as to the procedure. Jurisdiction over the assigned property is by the statute given to the state courts. It could not well be otherwise. Methods of procedure are prescribed; but such is the case as to general rules of practice. The state law enacts them, and the federal courts follow them. There is nothing of a substantial character in the methods prescribed which makes it impossible for courts of general jurisdiction, like the circuit courts of the United States, to take possession of assigned property and dispose of it in accordance with the terms of the state statute. And where the question arises solely on the matter of procedure, as a rule I think it may be affirmed that if the proceeding is one which by the terms of the state statute may be pursued in the

state courts of general original jurisdiction, it may also be pursued in the corresponding federal courts. A mechanic's lien may be foreclosed in the federal courts. So, where proceedings for the condemnation of land and the assessment of damages therefor are taken, they are, as has been repeatedly held, removable to and triable in the federal courts. See, as bearing upon this general question, *Strong v. Goldman*, 8 Biss. 552; 2 Story, Eq. Jur. § 1057; *Lackland v. Garesche*, 56 Mo. 267. This is not the case of a naked statutory right, with a procedure for its enforcement, which is not adjustable to the ordinary processes and practices of the courts, and in which the right is limited by and enforceable only in the statutory remedy.

Finally, it is insisted that the plaintiffs, being only general creditors, and not having, as yet, reduced their claims to judgment, have no standing in a court of equity to enforce such claims as against these transfers. The opinion in the case of *Dahlman v. Jacobs*, *supra*, sustains this view, but the decision there was subsequently set aside in the same case. 16 FED. REP. 614. True, in this latter opinion, nothing is said as to the specific ground upon which the former was based, so that opinion was not expressly overruled; but in view of the decision of the supreme court of the United States in *Case v. Beauford*, 101 U. S. 688, I am constrained to rule against the defendants on this proposition. In that case it was decided that "whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting his remedy at law." The first clause of this decision covers this case. The plaintiffs seek to charge the defendants, holding certain property as trustees for them and other creditors. The *gravamen* of the suit is the enforcement of a trust. Strike that out and nothing is left. And, in accordance with that decision, it must be held that a general creditor may, without reducing his claim to judgment, proceed in equity to charge one holding the property of his debtor received under such an assignment or transfer as a trustee for the benefit of creditors. *Ins. Co. v. Transp. Co.* 10 FED. REP. 596; *Same v. Same*, 13 FED. REP. 516; *Batchelder v. Altheimer*, 10 Mo. App. 181; *Holt v. Bancroft*, 30 Ala. 193; 1 Story, Eq. Jur. §§ 546, 547. These are all the substantial questions presented.

The demurrer must therefore be overruled, and defendants will have leave to answer by the September rules.

UNITED STATES v. MAXWELL LAND-GRANT Co. and others.

(Circuit Court, D. Colorado. July 28, 1884.)

1. LAND GRANT—EFFECT OF CONFIRMATORY ACT OF CONGRESS ON SURVEYOR'S REPORT.

An act of congress confirming the report of the surveyor general of the territory of New Mexico as to the validity and extent of a Mexican land grant operates as a grant *de novo* of all the land *within the boundaries* as given in that report.

2. SAME—ERROR OR FRAUD OF SURVEYOR—POWERS OF THE COURTS.

If a surveyor, having been directed to make a survey of 22 leagues, in fact surveyed 44 leagues, and platted a tract thereof, the error is one that can be corrected by the courts, even after the issue of the patent; and that, notwithstanding the principle that a confirmatory act of congress secures to the patentee all the land included in the boundaries given in the surveyor's report.

3. SAME—OFFICERS OF THE GOVERNMENT—AGENCY—SCOPE OF AUTHORITY.

All the officers of the government, from the highest to the lowest, are but agents with delegated powers, and if they act beyond the scope of those delegated powers their acts do not bind the principal.

4. SAME—INVALIDITY—SUBSEQUENT PURCHASERS—WHAT IS NOTICE.

When a patent on its face recites the terms of the original petition and grant, and gives the description in full, as well as the lines of the survey based thereon, the purchaser of a title under such patent is chargeable with notice of whatever it contains.

On Demurrer to the Bill.

J. A. Bentley, for complainant.

Frank Springer and *C. E. Gast*, for defendants.

BREWER, J. This was an action brought by the United States to set aside a patent to what is known as the Maxwell land grant, or to so much of it as lies within the state of Colorado. The case now stands on demurrer to an amended bill. Two principal questions have been presented and argued.

First. It is insisted that the extent of the original concession to Beaubien and Miranda did not exceed 11 square leagues to each, or less than 96,000 acres, and that the description in the petition, and other papers executed while the territory was a province of Mexico and before its acquisition by the United States, only defined the outer boundaries within which a tract of 22 square leagues could be selected by the applicants; and this, because, under the Mexican decree of August 18, 1824, as well as the regulations of November 21, 1828, only 11 square leagues could be granted to any one person; that the confirmation by the act of congress must be understood as limited to the terms of the original concession, and as confirming only a grant to that extent. I think the case of *Tameling v. Freehold Co.* 93 U. S. 644, effectually disposes of this question. That case held that the confirmation by an act of congress was equivalent to a grant *de novo*, and I seeing no substantial difference between that case and this. In order to a clear understanding of the point of difference presented by counsel for the government, a brief statement of the action of congress is necessary.

After the treaty of Guadalupe Hidalgo, by which we acquired this territory, congress, in 1854, (10 St. p. 308, § 8,) cast upon the surveyor general of the territory of New Mexico the duty of ascertaining the origin, nature, character, and extent of the private land claims therein, and required him to make a full report, with his decision thereon, to be laid before congress for such action as it should deem fit. In pursuance of that duty the surveyor general, on September 15, 1857, transmitted his report as to this claim, showing a petition for a grant of lands, describing them only by the outer boundaries, the grant by the governor of the territory, the giving of juridical possession, a dispute as to the grant, its confirmation by the departmental assembly, its occupation by the grantees, and then his opinion that it was "a good and valid grant according to the laws and customs of the government of the republic of Mexico." Some 18 of these land claims were in separate reports thus transmitted by him to congress and placed before that body for action, and on the twenty-first of June, 1860, an act was passed confirming most of them, in accordance with the recommendation and decision of the surveyor general. Among these claims No. 15 was the one in controversy in this suit. No. 4 was the one which came before the supreme court for consideration in the case just referred to. In the report of the surveyor general of that claim, after narrating the prior proceedings, which were similar to those in the case at bar, he makes this decision:

"The grant being a positive one, without any subsequent conditions attached, and made by a competent authority, and having been in the possession and occupancy of the grantees and their assigns from the time the grant was made, it is the opinion of this office that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition. The grant is therefore approved by this office, and transferred to the proper department, with the recommendation that it be confirmed by the congress of the United States."

So that while in that case he declared that the grant was a good and valid one, and that a legal title was vested in Charles Beaubien to the land embraced within the limits contained in the petition, in this he simply says that it is a good and valid grant according to the laws of the government of the republic of Mexico; hence counsel argues that as by such laws only 11 square leagues could be granted to a single person, what the surveyor general meant to say was simply that it was a good and valid grant to the extent of 22 square leagues within these outer boundaries, and that congress, confirming his report, only confirmed the grant to that extent. As heretofore stated, I do not think the difference between the cases of any significance. All preliminary statements in the two reports, as to petition, description, grant, and occupation, are alike. In each the petition is for the land described, and not a tract within the boundaries named. In neither is any notice of the alleged limitation of 11 square leagues. In each the land described is largely in excess of such limitation, in

that case amounting to over a million of acres. Each speaks of the grant, and affirms that it is valid, and does not say that there is a valid grant within the lands described. There is no suggestion of the boundaries of a tract of 11 or 22 square leagues within the out-boundaries, and, indeed, no reference to any tract but the single one described, and for which the petition was originally presented. Congress, in the act of confirmation, confirms these claims as recommended. By the same act, however, two other claims reported and recommended for confirmation by the surveyor general were confirmed,—the one only to the extent of five square leagues, and the other to two persons, to the extent of twenty-two square leagues; and in the second section the rules for locating these two tracts of five and twenty-two square leagues within the out-boundaries of the claims were prescribed. Evidently, the attention of congress was directed to the extent and boundaries of these claims, and if it had intended to confirm a grant of only 22 square leagues within the out-boundaries of this tract, it would, as in the other cases, have prescribed some rule for locating such grant. No other reasonable interpretation can be put upon the language of the surveyor general than this: that he believed the grant was of the entire land, that it was a good and valid grant according to the laws of Mexico, and that he recommended it as a whole for confirmation. It would be a strained and unnatural interpretation of such language to say that it meant simply that there was a valid grant within these out-boundaries; and the confirmation was of the grant as he stated it was made.

In coming to this conclusion I am not insensible of the rule that where there is a doubt as to the extent of a grant from the government the doubt is to be resolved in favor of the government; but, notwithstanding this, I think the language of congressional grants, and of all papers and instruments appertaining thereto, should be taken in its ordinary and natural meaning, and that there should be no straining of language or twisting of terms in order to disclose limits and exceptions therein. When a report is made that a petition was filed for a grant of certain lands, describing them, and that such lands were granted and have been occupied by the grantees, no one would for a moment suppose that it was the intention simply to say that within the boundaries described there was a valid grant for a smaller and undescribed portion of land.

I hold, therefore, that the act of congress operated as a grant *de novo* for all the land within the boundaries as given in the report of the surveyor general.

The second question is this: Assuming that the grant was good for all the land within the out-boundaries, and not simply for the 22 leagues, the bill alleges that the patent covers about 270,000 acres of land in Colorado not within those out-boundaries, and that this patent was obtained by fraud and misrepresentation. It charges that, in 1870, which was after the confirmatory act, and while the

parties interested were seeking to obtain a patent, some of them employed one W. W. Griffin, a deputy United States surveyor, to make a survey of the out-boundary lines; that he did make a survey and plat, which was filed in the interior department; that by that survey and plat some 500,000 acres were included within these lines, which did not properly belong there; that thereafter and in 1877 the land department awarded a contract to two deputy United States surveyors to survey the grant on behalf of the United States; that these deputy surveyors did not run the true boundaries, but falsely and fraudulently, and with intent to cheat the government, ran their easterly and northerly lines at a great distance from the true boundaries, and so as to include therein about 270,000 acres of land lying within the state of Colorado. It is true, the bill does not show any improper relations or dealings between the parties interested in the grant and these two deputy surveyors, upon whose survey the patent issued; and upon that counsel for the defendants insist that whatever of wrong may have been done by the surveyors is not chargeable to them; that the government cannot take advantage of it; and that the courts cannot set aside a patent because of any mistake in the survey, the matter of survey being wholly within the jurisdiction of the land department; and the cases of *U. S. v. Flint*, 4 Sawy. 51; *U. S. v. Sepulveda*, 1 Wall. 104; and of *U. S. v. Vallejo*, Id. 658, are cited. I do not think these cases can be regarded as decisive of this question, for they must be read in the light of the special provisions of the statute concerning the settlement of California land claims. By these provisions a commission was established to determine the validity of such claims, with right of appeal to the district court, and after the validity of the claims had been finally established, the duty of making the survey was specifically cast upon the surveyor general, with right of review before the commissioner of the land department at Washington, while here the only provision to which I have been referred is found in section 2447 of the Revised Statutes, which provides that it may be lawful to issue patents for confirmed claims "upon the presentation to the commissioner of the general land-office of plats of survey thereof, duly approved by the surveyor general of any state or territory, if the same be found correct by the commissioner."

Now the principle upon which defendants make their claim is that laid down in the case of *U. S. v. Arrendondo*, 6 Pet. 729, as follows:

"That where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are, power in the officer and fraud in the party."

And it is insisted that, as no fraud in the party is shown, the patent is beyond question, no matter what mistakes or wrong may be charge-

able to the officers of the government. I do not think that principle, when fairly construed, extends to the case at bar so far as to support the claim of the defendants. It is obvious that surveys may be made in two very different classes of cases. In the one class the surveyor may be directed to survey a tract of a given number of acres. In such a case, there being no special provision as to the form or location of the tract, a discretion must be left with him. He may survey the tract in a square form or with irregular boundaries, or locate it anywhere within the prescribed out-boundaries. Thus, in the case at bar, if the claim had been confirmed to the amount of 22 leagues only, it might fairly be held that the surveyor had a discretion whether to locate these 22 leagues in a square form or in a tract of irregular shape, and anywhere within the out-boundaries, and that when he had made a survey and plat of such number of leagues, and a patent had been issued therefor, the matter was beyond inquiry in the courts. Yet even in such cases, at least before the issue of the patent, it would seem, from the remarks of Mr. Justice MILLER in the case of *U. S. v. Vallejo, supra*, there might be circumstances which would justify a review of the surveyor's action in the courts; and, on the other hand, if he included in his survey a tract larger than he was authorized, his error ought to be correctible in the courts even after the issue of the patent. Thus, if he were directed to make a survey of 22 leagues, and, in fact, surveyed and platted a tract of 44 leagues, I think the error one that could be corrected even after the issue of the patent, and that the principle heretofore referred to could not be invoked to sustain his action. His action would be beyond his jurisdiction, which was limited to 22 leagues, and therefore not binding on the government, for the action of no tribunal or officer beyond the limits of the jurisdiction conferred is binding. The other class of cases exists where the surveyor is required to survey, not a tract of a given number of acres, but a tract of certain specified general boundaries. In that case he has no general discretion. He may not run the lines where he sees fit, or include within his survey any land outside of those general boundaries. It is, perhaps, true that where the calls in such a general description can be upon the configuration of the ground answered in two or three different ways, his judgment as to the true answer, when confirmed by the department at Washington and followed by a patent, may be beyond the challenge of the government. But when these calls are in fact disregarded and the lines run far outside the general description, I think it must be held that he has gone outside his jurisdiction. Of course, no trifling departure would, after the solemn act of the issue of a patent, justify the interference of a court of equity; but when such departure is a gross one, and a large body of land not within the specified out-boundaries is included within the survey, it seems to me a case is disclosed for the interposition of the courts. All the officers of the government, from the highest to the lowest, are but agents

with delegated powers, and if they act beyond the scope of those delegated powers their acts do not bind the principal. Thus, if a grant was made of a specific section of land, and on the authority of such grant a patent was issued for two sections, it could not be claimed that the government was bound thereby, and could not set aside the patent so far as it included the second section. That, it seems to me, is parallel with the case at bar. The confirmation was of the grant with certain named out-boundaries, and the allegation is that the lines of the survey did not follow those out-boundaries, but extended far beyond them, so as to embrace 270,000 acres of public lands lying within the limits of this state. Such action of the surveyor, although confirmed by the commissioner and followed by a patent, seems to me to have been outside the jurisdiction and not binding on the government. I do not think the surveyor general, the commissioner of the general land-office, the secretary of the interior, or the president, or all together, can give away public lands, either directly or indirectly; and when they have executed instruments apparently conveying lands not granted by congress, the government can come into the courts for relief.

But it is said that the present owners have acquired title since the patent, have bought on its faith, and that as between them and the government the latter ought, therefore, to suffer for the conduct and mistakes of its officers and agents. The bill alleges, in a general way, notice by the defendants of all the mistakes and wrongs charged. But I do not lay so much stress on this, to defeat the application of the principle suggested, as upon the fact that the patent on its face recites the terms of the original petition and grant, gives the description in full, as well as the lines of the survey based thereon; and I take it that every one who purchases a title under such a patent is chargeable with notice of whatever it contains. The purchasers, therefore, had notice that congress only confirmed the grant as originally petitioned for, and that the officers of the government had no authority to issue a patent for any land outside those boundaries. They knew, or at least are chargeable with knowledge of, the fact now alleged in the bill, that the lines of this survey run way outside of the out-boundaries as given in the grant. Of course, this precludes them from occupying the position of innocent purchasers.

I think, therefore, that the demurrer to the bill must be overruled. The defendants will have leave to answer by the October rules.

DEMING v. NORFOLK & W. R. Co.

(Circuit Court, E. D. Pennsylvania. June, 1884.)

1. CARRIERS—THROUGH LINES—RESPECTIVE LIABILITY OF CONNECTING CARRIERS.

Several connecting carriers, having entered into certain contract arrangements for continuous transportation on through bills of lading, at settled rates of compensation, providing that each line should be responsible alone for its acts or omissions, do not thereby become liable as partners for the undertakings, representations, or misconduct of the carrier who receives merchandise from a shipper.

2. SAME—DELIVERY—BLOCK IN THROUGH LINES—LOSS BY FIRE—NEGLIGENCE.

Where cotton was delivered to a carrier to be transported from Memphis, Tennessee, to Woonsocket, Rhode Island, upon through bills of lading, exempting liability for fire, issued by the receiving carrier in pursuance of such arrangement between the connecting carriers, and the cotton was delayed at Norfolk by reason of a block caused by accumulation of freight on the line intended to convey it therefrom, and was stored in the defendant's warehouses, where it was burned, *held*, that the company so storing the cotton was not bound to send the cotton forward by other lines, and was not liable for the loss. The fact that the company had effected an insurance on the cotton is unimportant.

This was an action on the case by R. H. Deming & Co. against the Norfolk & Western Railroad Company, and was tried without a jury before the Hon. WILLIAM McKENNA and WILLIAM BUTLER. The following facts were found:

First. The Norfolk & Western Railroad Company, the defendant, is a corporation owning and operating a line of railroad extending from Bristol, Tennessee, to Norfolk, Virginia. At Bristol it connects with the line of the East Tennessee, Virginia & Georgia Railroad Company, and at Roanoke, about 130 miles east of Bristol, with that of the Shenandoah Valley Railroad Company, which connects at Hagerstown with the Pennsylvania Railroad system. These companies have entered into certain contract arrangements for the conduct of through business, under the name of the Virginia, Tennessee & Georgia Air-line, but there is no other evidence in the case showing the terms of this contract than appears in the bills of lading and manifests, and the conduct of the parties as hereinafter stated.

Second. On October 11, 1883, the plaintiffs, R. H. Deming & Co., who are cotton buyers, shipped at Memphis, Tennessee, for Woonsocket, Rhode Island, two lots, one of 50 and the other of 100 bales, and on October 17, 1883, another lot of 100 bales. The shipment was made upon the Memphis & Charleston Railroad, and three full bills of lading, all similar in form. The material clauses of the bills of lading are as follows:

"MEMPHIS & CHARLESTON RAILROAD AND CONNECTIONS.

"(East Tennessee, Virginia & Georgia Railroad Company, Lessee.)

"OCTOBER, 1883.

"Received of A. B. the following packages, marked, etc., to be transported by the Memphis & Charleston Railroad, and connecting railway and steamship lines, to order, at Woonsocket, R. I., * * * upon the following conditions:

"(1) That the Memphis & Charleston Railroad, and the steam-boats, railroad companies, and forwarding lines with which it connects, and which receive said property, shall not be liable * * * for loss or damage on any article of property whatever by fire or other casualty while in transit, or

while in depots or other places of transshipment, or at depots or landings at points of shipment or delivery.

* * * * *

"(7) In consideration of the special rate named in margin, the shipper or agent of the owner of the property carried agrees to effect an insurance against loss or damage by fire while in transit, in deposit, or in places of transshipment, or at depots or landings at all points of delivery; and it is expressly agreed that the carrier shall be entitled to the benefit of any insurance effected covering any such risk, loss, damage, or detriment.

"(8) It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property here receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of said loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"This contract is executed and accomplished, and the liability of the companies as common carriers thereunder terminates, on the arrival of the goods or property at the station or depot to which this bill contracts, and the companies will be responsible as warehouseman only thereafter; and unless removed by consignee from the station or depots of delivery within twenty-four hours of their said arrival, they may be removed and stored by the companies at the owner's expense and risk.

"NOTICE. In accepting this bill of lading, the shipper or the agent of the property carried expressly agrees to all stipulations, exceptions, and conditions.

"In witness whereof, the agent hath affirmed to ——— bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.
"———, Agent."

Third. The route over which the cotton was to be carried, as fully understood by the plaintiffs, was by the Memphis & Charleston road to Chattanooga; thence by the East Tennessee, Virginia & Georgia Railroad to Bristol; thence by the Norfolk & Western Railroad to Norfolk; thence by the steamers of the Merchants' & Miners' Steam-ship Company to Providence. Manifests or way-bills, which are *memoranda* sent by the first carrier with each car containing instructions to the succeeding carriers for the transshipment and final delivery of the freight, accompanied each shipment, giving the directions under which the cotton was to be transported and transferred from one carrier to the other. The through freight was 74 and 78 cents per hundred pounds, which was less than one-half the sum which would have been charged had the cotton been shipped and reshipped over each of the connecting lines. The plaintiffs had made other shipments by the same route, and knew the line of steamers by which the cotton was to be carried from Norfolk to Providence. The time occupied in transport between Bristol and Norfolk by railroad is 48 hours, and from Roanoke to Norfolk is 36 hours. The usual delay in transshipment at Norfolk was two days. In ordinary course of transportation cotton reaches Providence in 14 to 18 days from Memphis, and it was the usual course of dealing of the plaintiffs to send out tracers if the cotton did not arrive within 20 days from the time of shipment.

Fourth. The Merchants' & Miners' Transportation Company run two lines from Norfolk,—one to Boston and one to Providence,—and prorate with the Virginia, Tennessee & Georgia Air-line upon all freight received from over that line; and, by an understanding between the steam-ship companies running steamers from Norfolk, is the only line that carries freight to points

east of the Connecticut river. Under the same understanding, the Old Dominion Steam-ship Company, running to New York, was to receive all freight to points west of the Connecticut river, and the Baltimore Steam Packet Company for Philadelphia, in connection with the Philadelphia, Wilmington & Baltimore Railroad. Upon the Providence line there were four steamers, making tri-weekly trips, which were of sufficient capacity to carry the freight that usually offered.

Fifth. Upon the fifteenth of October the transportation company was unable to accept 500 bales of cotton till the next day, on account of accumulations of freight which had grown gradually from early in the month. Between the fifteenth and twenty-third of October there had been communication between the officers of the two companies in reference to the forwarding of the increased quantities of freight that were in transit. The Norfolk agent of the steam-ship company visited Baltimore, Philadelphia, and New York to charter other steamers, and chartered the only steamer which he had succeeded in finding. This steamer arrived at Norfolk on October 28th. The president of the steam-ship company also promised to transfer in a few days one of its Savannah steamers to the Providence line to accommodate the unusual influx of business; and in order to increase the number of trips between Norfolk and Providence, temporarily stopped running up to Baltimore, which was on the route. In the fall of the year all lines of transportation from the south to the north are commonly more or less crowded, but the pressure in October and November, 1883, was unusually great upon all lines. When the first shipment arrived on the twenty-third of October, an extra steamer was expected in a few days. About 12,000 bales of cotton had accumulated on the wharves and warehouses of the steam-ship company, and when the first shipment of the cotton in question arrived upon the twenty-third of October, and the agent of the railroad company tendered delivery in due course, no more could be conveniently stored at that point, and the agent of the steam-ship company declined to accept it, upon the ground that he had no place to store it, but proposed that if the railroad company would unload and store in its own warehouse and on its wharf about 2,000 bales of cotton, he would pay for insurance upon it and send a steamer in a few days to remove it. The wharf is the regular terminus of the railroad of the defendant in the city of Norfolk, and equally accessible as that of the steam-ship company to steamers. In view of the declared and actually existing impossibility of its receipt by the transportation company, and in reliance upon the assurance from the officers of the steam-ship company that an additional steamer would be forwarded to remove the cotton within a few days, the superintendent of the railroad company authorized the Norfolk agent to unload the cotton and effect an insurance of \$100,000 in the name of "The Norfolk & Western Railroad Company, and for account of whom it may concern." On October 26th about 1,000 bales additional arrived, making 3,028 bales in all, and were unloaded under the same agreement, and \$40,000 additional insurance was effected. The premiums were paid by the steam-ship company.

The exact dates of the arrival of the cotton were as follows:

| | | | | | | | | |
|----------------------------|---|---|---|---|---|---|---|-----------|
| 1883, October 22, | - | - | - | - | - | - | - | 61 bales. |
| 23, | - | - | - | - | - | - | - | 826 " |
| 24, | - | - | - | - | - | - | - | 352 " |
| 25, | - | - | - | - | - | - | - | 842 " |
| 26, | - | - | - | - | - | - | - | 714 " |
| 27, | - | - | - | - | - | - | - | 103 " |
| 31, | - | - | - | - | - | - | - | 107 " |
| Date of arrival not given, | - | - | - | - | - | - | - | 23 " |

3,028 bales.

The cotton thus stored on the defendant's wharf and in the warehouse was cotton destined for Providence, and was selected by the steam-ship company for unloading at the wharf for this reason. No increased risk of fire arose from placing the cotton on the wharf and in the store-house, as was done. It was the custom of each company to insure merchandise in its custody, and like insurance would have been taken out if the cotton had been stored at the steam-ship wharf. From day to day repeated assurances were given that a steamer would be sent, and the extra vessel, which arrived on October 28th, had been promised for the removal of this cotton, but was loaded at the other wharf, because of some difficulty in reference to the coaling or loading; and the Berkshire, a vessel capable of carrying about 5,000 bales of cotton, was transferred from the Savannah line to Norfolk, and she was expected to reach there on the thirteenth of November, but did not do so until the night of the fourteenth of November, having been delayed at Boston or on her way. On the morning of the fourteenth of November a fire occurred which destroyed the larger part of the cotton. None of the 3,028 bales could be identified, and the loose cotton saved was sold under the direction of the fire underwriters, and the proceeds deposited in bank for the benefit of whom it might concern. The value of the plaintiff's cotton which was burned was \$9,121.87. No notice was given to the plaintiffs of the storage and detention of the cotton, and it does not appear from the evidence that tracers were sent out or inquiry made by the plaintiffs. Notice of the loss of their cotton was given to the plaintiffs in Providence by letter dated Norfolk, November 27th, which was the first knowledge the plaintiffs had of their loss. No notice was given to the plaintiffs of the sale of the remnants of the cotton saved from the fire. The cotton burned had been sold by the plaintiffs to the mills for consumption. In addition to the 3,028 bales already mentioned, another lot of cotton, amounting to 1,000 bales, insured in the name of the steam-ship company, was stored in the same warehouse, and was also burned, making about 4,000 bales in all.

Sixth. After October 26th, and up to the time of the fire, freight continued to be received at Bristol, and other cotton at the rate of about 800 bales a day arrived by the Norfolk & Western Railroad, and was delivered to the steam-ship company, and large shipments were made from the steam-ship wharf to Boston and Providence; but it does not clearly appear that any cotton reaching Norfolk after October 26th had been shipped before November 14th. This fact is left in doubt by the testimony; but it is shown that no considerable quantity went forward, and no intentional preference was given. If the steamer which arrived on October 28th had been sent as promised by the steam-ship company to the railroad wharf, the plaintiffs' cotton would have been forwarded on that or the following day.

Seventh. Cotton could be forwarded by sail from Norfolk to Providence, but no cotton has been shipped coastwise by sail from that port for the last 10 years. Schooners that had been employed in other trades were seeking freights in Philadelphia and New York. A steam-ship, the Juniata, with a capacity of 2,500 bales, could have been chartered at Philadelphia on and after November 7th. This fact was not known to the defendant or to the agent of the steam-ship company, nor was the vessel advertised for charter or put in the hands of brokers. The Juniata had previously been moving cotton between Savannah and New York. No attempt was made to forward by the Shenandoah Valley Railroad via Roanoke. Cotton is sent to New England points from the south-west by this line, but a block existed there, which lasted from July until nearly Christmas; and the arrangements for transferring cars, necessitated by a change of gauge at that point, were not completed until February, 1884. The bulk of cotton, however, goes forward via Norfolk, that being a cheaper and more convenient route. No attempt was made to forward by the Canton line to Baltimore, and thence to destination by rail, it be-

ing known to the agent of the steam-ship company that its line was also running full, and upon application it did decline to charter one of its steamers. The Merchants' & Miners' Company offered the cotton for transportation to the Old Dominion Steam-ship Company. That line was also crowded, and the cotton was refused. In other respects the Merchants' & Miners' Company confined its efforts to chartering additional steamers, as already stated. It does not appear that the railroad company itself made any efforts to secure other transportation to Providence after the refusal of the Merchants' & Miners' Company to accept, but relied upon the assurances of the officers and agents of the steam-ship company that vessels would be supplied in a few days.

Eighth. The plaintiffs held an open policy of insurance in the Phoenix Insurance Company of Brooklyn, covering the entire transit from Memphis to Woonsocket, as follows:

"By the Phoenix Insurance Company, R. H. Deming & Co., on account of themselves, and to cover all cotton consigned to them by invoice and bill of lading, in case of loss to be paid in funds current in the city of New York, to them or order, do make insurance and cause to be insured, lost or not lost, at or from any seaport or inland town in the United States, direct or via port or ports to Boston, New York, Providence, and mills in the New England states. The fire shall be covered by this policy for not exceeding ten days prior to shipment, and for not exceeding ten days after arrival and discharge at port or place of destination, without additional charge of premium therefor. On cotton and other merchandise, each ten bales subject to separate average. To cover all cotton, whether consigned to them or to other parties in which the said R. H. Deming & Co. have an interest. To attach to all shipments, whether indorsed or not, but notice to be given this company as soon as known to the assured. This policy to attach as soon as the property is at the risk of the owner. Either party at liberty to cancel on giving ten days' written notice, but not to prejudice any risk then pending. Sum insured, \$500,000, upon all kinds of lawful goods and merchandise, laden or to be laden on board the good vessel or vessels or conveyances. To attach to all shipments made on and after this date. Insured for cost and ten per cent. unless otherwise agreed upon at time of indorsement. Also to cover such other shipments as may be approved and indorsed by this company. Premiums to be settled monthly."

Morton P. Henry and R. C. McMurtrie, for plaintiffs.

The carrier who accepts goods to be carried beyond his own line for a through rate is bound to have transportation ready at the terminus of his line. *Bussey v. Memphis & L. R. R. Co.* 13 Fed. Rep. 330; *Railroad v. Manuf'g Co.* 16 Wall. 318; *Great Western R. Co. v. Burns*, 60 Ill. 284. The carrier is liable upon deviation from contract. *Maghee v. C. & A. R. Co.* 45 N. Y. 514; *Falvey v. Northern Transp. Co.* 15 Wis. 129; *Cassilay v. Young*, 4 B. Mon. 265; *Merchants' Ins. Co. v. Algeo*, 32 Pa. St. 330; *Davis v. Garrett*, 6 Bing. 716; *Hand v. Baynes*, 4 Whart. 201; *Robinson v. Merchants' Dispatch Co.* 45 Iowa, 472. The burden is upon carrier to show excuse. *Falvey v. Northern Transp. Co.*, *supra*; *Bussey v. Memphis & L. R. R. Co.*, *supra*.

Samuel Dixon and Wm. Allen Butler, for defendant.

Connecting carriers are not liable for the capacity of each succeeding carrier to immediately receive all goods which may be tendered. *Ins. Co. v. Railroad Co.* 104 U. S. 146; 3 Amer. & Eng. Ry. Cas.

271; *Myrick v. Railroad Co.* 107 U. S. 102; S. C. 1 Sup. Ct. Rep. 425; *Helliwell v. Grand Trunk Ry. Co.* 7 FED. REP. 68. If liable at all, the measure of damages would be the depreciation or loss of market value resulting from the delay, and no such loss is shown. *Railroad v. Reeves*, 10 Wall. 176.

BUTLER, J. What were the defendant's obligations? Did it discharge them? The answer to the first question involves the relations of the parties, as shipper and carrier. Did these relations spring from the express contract, entered into on receipt of the merchandise at Memphis, or an implied contract, arising from its receipt in transit at Bristol. The defendant was not a party to the bill of lading, nor responsible for anything done or omitted, when the merchandise was received at Memphis. The agreement between the several railroad companies did not make them partners, nor responsible in any respect for each other's acts or contracts. They were connecting carriers on a through route, each having the exclusive ownership and control of its line, with arrangements for continuous transportation on through bills of lading, at settled rates of compensation, each being alone responsible for its own acts or omissions, as specified in the bill before us. That such agreements do not render intermediate carriers responsible for the undertakings, representations, or misconduct of the carrier who receives merchandise from a shipper, seems to be so fully settled by the authorities as to leave nothing for discussion. It was the point directly involved and decided in *Ins. Co. v. Railroad Co.* 104 U. S. 146.

The defendant's obligations were, therefore, those of an intermediate carrier, arising out of the implied contract springing from receipt of the goods. These bound it for safe carriage over its own line, and for delivery or tender to the next carrier beyond, within reasonable time. *Ins. Co. v. Railroad Co.*, *supra*; *Empire Co. v. Wallace*, 18 P. F. Smith, 302; *Myrick v. Railroad Co.* 107 U. S. 102; S. C. 1 Sup. Ct. Rep. 425; *Railroad Co. v. Manuf'g Co.* 16 Wall. 318; *Amer. & Eng. Ry. Cas.* 271. It was entitled to the benefit of all exemptions allowed by the skipper, and bound to the terms of the bill of lading generally, as respects freight, etc. Being prepared to carry the merchandise, on its arrival at Bristol, it was the defendant's right as well as duty to accept it without inquiry. Had it not been so prepared, the acceptance would have rendered it responsible as carrier while the merchandise remained in its possession, no matter how great the delay arising from this cause might have been. The defendant was not, however, responsible for the succeeding carrier's failure to accept or provide means for further transportation. If the Memphis & Charleston Railroad Company, when it received the merchandise, was aware of the deficient means of transportation from Norfolk, (and that delay must consequently arise,) and failed to communicate this fact to the shipper, we may assume that this company was in fault. To visit the defendant, however, with responsibility for such fault, it

must appear that the latter is responsible for the former company's acts, and we have found it was not. If knowledge of this fault would entail responsibility on the defendant through acceptance of the merchandise, such knowledge could not be inferred from anything shown. The defendant, as before stated, was bound to no inquiry, and had (so far as appears) no information on this subject. It is unimportant that the defendant knew of the embarrassments at Norfolk when it received the merchandise at Bristol. Being then in transit the defendant's duty bound it to such reception. No probable benefit could arise to the shipper from refusing. In view of existing circumstances, a refusal might have entailed serious responsibilities.

The cases relied upon by the plaintiff (*Railroad Co. v. Manufg Co.* 16 Wall. 318, and *Bussey v. Railroad Co.* 13 FED. REP. 330) are inapplicable. The obligations involved were those of carriers receiving merchandise from the shipper, and either undertaking to provide means of carriage throughout,—as in the latter case,—or failing to communicate knowledge (which they had) of obstacles in the way of transportation,—as in the former. The responsibility arose in the one case, out of the express undertaking, and in the other, out of the bad faith.

Such being the defendant's obligations, did it discharge them? It carried the merchandise safely and expeditiously to Norfolk. When the first consignment arrived on the twenty-third of October, it was tendered to the Merchants' & Miners' Steam-ship Company, and was refused on account of accumulation of freight on its wharves; with the request or proposal, however, to place it and subsequent consignments on the wharf and in the warehouse of the defendant, (a place as convenient for loading into the steam-boat company's vessels as on its own wharves,) and with assurance that vessels would speedily be provided and sent there for it. This request was complied with, under a reasonable expectation that the steam-ship company would load and forward the cotton without unreasonable delay. Placing the subsequent consignment as proposed was a substantial tender. The designation of this place for loading was a virtual designation of the place for tender. To hold that the defendant should have hauled the cotton which arrived on the 26th to the steam-ship company's wharves, in view of what had occurred, would be unreasonable and unjust. The fact that insurance was procured is unimportant. Should the defendant have done more? In view of the facts it was not required to forward by any other route, nor would it have been justified in doing so. The steam-ship company was the carrier contemplated by the plaintiff. Indeed, it must be regarded as having been designated by him. If not on shipment at Memphis, it certainly was on delivery to the defendant. Those so delivering represented the plaintiff. That a preceding carrier represents the shipper in forwarding by his successor on a through line (under ordinary circumstances) is settled. The plaintiff's insurance would have been

jeopardied by the substitution of any other route. Besides this, as already stated, the defendant was fully justified in believing that the merchandise would be accepted and carried within a reasonable time by the steam-ship company, and would reach its destination more expeditiously by this route than any other. But for unforeseen circumstances, which could not be anticipated, this expectation would have been realized. Furthermore, it can hardly be said that there was any other practically available route. The defendant was not, therefore, in fault.

It must not be overlooked that the question here is not (as in *Railroad Co. v. Manuf'g Co.* 16 Wall. 318) whether the defendant remained liable under his obligations as carrier to the date of loss, but whether he was guilty of *willful fault*, and consequently forfeited the exemptions in the bill of lading, and thus became responsible for the consequences of the fire. That he was not guilty of such fault seems reasonably clear.

Judgment must therefore be entered for the defendant.

McKENNAN, J., concurring.

BECKETT and another v. SHERIFF HARFORD Co.

(Circuit Court, D. Maryland. July 19, 1884.)

1. JURISDICTION—STATE COURT—FEDERAL COURT—CONFLICT—ARREST OF UNITED STATES MARSHAL BY STATE COURT PROCESS.

A state court has no jurisdiction to interfere with a marshal of the United States in his execution of the process of a United States court.

2. SAME—PROPER COURSE TO BE PURSUED.

If, under a writ of replevin, the marshal, by virtue of the writ, seizes property supposed to be that of the defendant, which, in reality, is the property of another, it is not within the jurisdiction of the state court to arrest him for executing the process of the United States court, but the real owner must come into the United States court and by an ancillary process have his claim to the property determined against the plaintiff in the suit, in whose behalf the process of the court has been awarded.

3. SAME—COURT OF THE REMEDY.

The parties are to seek their remedy in the court whose officer is alleged to have offended, but he cannot be arrested by any other court of concurrent jurisdiction.

4. SAME—SEIZURE OF PROPERTY HELD UNDER PROCESS OF STATE COURT.

A court of the United States has not jurisdiction to take into its possession property which has been seized and taken into the possession of a state court by any process of that court.

In the Matter of *Habeas Corpus*.

Blackiston & Blackiston, for petitioners.

Henry W. Archer and *Archibald Stirling, Jr.*, for the sheriff of Harford county.

BOND, J. On the fifteenth of July last J. O. Beckett and George Peacock filed their petition in this court asking to be relieved from imprisonment in the jail of Harford county, Maryland, where they allege they are illegally confined by order of the circuit court of that county. They allege in their petition that at the time of their arrest they were engaged in executing a writ of replevin issued out of this court at the suit of H. K. & F. B. Thurber & Co., commanding the marshal of the United States, of whom they were deputies, to replevy and deliver to the plaintiffs 3,000 cans of tomatoes mentioned in the writ of replevin, and that they are now held in custody for performing their duty in pursuance of that writ.

The sheriff of Harford county makes return to the writ of *habeas corpus*, in which he traverses no fact set out by the petition for *habeas corpus*, but justifies his holding of the petitioners by virtue of a writ of attachment issued out of the chancery side of the court of Harford county, commanding him so to arrest and hold them for the disobedience of a writ of injunction of that court.

It is clear, from the authorities hereafter cited, that a state court has no jurisdiction to interfere with a marshal of the United States in his execution of the process of a United States court. If, under a writ of replevin, as in this case, the marshal, by virtue of the writ, seizes property supposed to be that of the defendant, which in reality is the property of another, it is not within the jurisdiction of the state court to arrest him for executing the process of the United States court, but the real owner must come into the United States court and, by an ancillary process, have his claim to the property determined against the plaintiff in the suit, in whose behalf the process of the court has been awarded. It is equally clear that no court of the United States has the jurisdiction to take into its possession property which has been seized and taken into the possession of a state court by any process of that court. The comity of the courts forbids any such interference between the one and the other; but should the case arise, as it might do by inadvertence and the want of knowledge of the facts on the part of either court, it would not give the one court or the other the power to arrest and imprison the officer for obeying the writ. The parties are to seek their remedy in the court whose officer is alleged to have offended, but he cannot be arrested by any other court of concurrent jurisdiction. He would be placed in the singular position,—in contempt of one court for obeying a writ, and of another for not obeying it. In this case, moreover, the property seized under the writ of replevin was not in the custody of the state court.

It is alleged in the return of the sheriff that a certain Thomas J. Oliver was indebted to certain parties in the sum of \$638, and that, being so indebted, he, on the twenty-fifth of April, 1884, made a deed of all his property, of every description, to Harlan & Webster, for the benefit of creditors. There is in the deed no nomination of the

canned tomatoes seized by virtue of the writ of replevin, and the claimant appears for the specific goods under a bill of sale from Oliver dated January 24, 1884, which, being duly recorded, is now admitted to have been really a mortgage, and not an absolute sale. The grantor remained in possession. The parties in the replevin claimed under a warehouse receipt for the canned goods, and, upon that warehouse receipt, claimed in replevin their right to possession. Under a statute of Maryland the trustees in the trust deed asked the circuit court of Harford county to assist them in the administration of the trust. The court passed no order in pursuance of this request. The parties defendant therein had not been served with process. No order to take possession of the canned tomatoes named in the writ of replevin is shown, and not till after a large quantity of the goods had been delivered to the plaintiffs in replevin, and all of them had been seized under that writ, was the circuit court of Harford asked to enjoin the marshal from removing them in obedience to that writ. The fact is, the property claimed in the replevin was in the custody of this court, and not in that of the circuit court of Harford county, when the injunction and writ of attachment issued, as appears from the evidence in this court now offered. While I think it was not necessary, yet I have thought proper to show, out of the respect which I entertain for the learned court of Harford, that the marshal of the United States was not, in point of fact, taking possession of property in the custody of that court, but only of property claimed by one under a deed of trust, and by another under a bill of sale, now admitted to be a mortgage, while the plaintiff in replevin claimed it under a warehouse receipt. But even if the marshal had seized and replevied goods in the custody of that court by virtue of a writ out of the circuit court of the United States, he was not liable to arrest and imprisonment for so doing. The parties had their remedy against his own bond, or against the replevin bond, or by any proceeding they chose to take in this court. That the state court did not take possession of Oliver's property by reason of the application of the trustees in the deed of trust for assistance to administer it, I rely on *Lanahan v. Nat. Bank of New York*, 60 Md. 477; and for the want of jurisdiction to arrest or imprison the marshal for executing a writ of this court by any other court, I rely upon the case of *Covell v. Heyman*, 111 U. S. 176, S. C. 4 Sup. Ct. Rep. 355, and the authorities therein cited.

The deputy marshals must be and are hereby discharged from custody.

JACKSON, Claimant, etc., v. UNITED STATES.

(Circuit Court, S. D. New York. July 28, 1884.)

1. INTERNAL REVENUE LAWS—IMPROPERLY STAMPED CIGARS—PRESUMPTION.

In case of a seizure of cigars alleged to be in boxes other than such as should have contained them according to the revenue laws, the natural and reasonable inference is that the cigars were removed from the factory in the condition in which they were found.

2. SAME—BURDEN OF PROOF—TRIFLING POINTS.

In prosecutions under the internal revenue laws it is incumbent upon the government to show affirmatively the existence of every fact which is an element of the act made penal. This rule, however, does not require every conjecture which may be started by the fertility of counsel to be overthrown; it suffices, if, upon the evidence in the case, the existence of the facts can be legitimately presumed.

3. SAME—ANTAGONISTIC PRESUMPTIONS OF INNOCENCE.

A defense being that in case of a seizure of cigars in boxes alleged to be not properly stamped, the presumption of defendant's innocence makes it incumbent on the government's counsel to show that the cigars were not taken out of the original and properly stamped boxes and put into those in which they were when seized, *held*, that such an act could not have been done without violating some of the several stringent provisions of the internal revenue laws, and subjecting the offender to criminal punishment. The presumptions in favor of innocence, therefore, neutralize each other.

On Writ of Error.

A. J. Dittenhoefer, for claimant.

Elihu Root, U. S. Atty., for the United States.

WALLACE, J. The writ of error brings up for review a judgment of the district court for the Southern district of New York condemning as forfeited to the United States certain cigars which the injunction alleges were "manufactured in some manufactory, United States internal revenue collection district and state, to the attorney for the United States unknown, and were removed from said manufactory or place where the cigars were made without stamping, burning, or impressing into each box, in a legible and durable manner, the number * * * of the manufactory, and the number of the district and the state."

Section 16 of the act of March 1, 1879, declares that whenever any cigars are removed from any manufactory or place where cigars are made without thus stamping into each box the number of the manufactory, and the number of the district and state, they shall be forfeited.

The evidence showed that the boxes here were stamped with the words "Factory No. 120, Dist. Florida," but that although there was such a factory at Key West, Florida, the cigars in suit were never manufactured at that manufactory. A label upon the boxes indicated that the cigars were made at Key West, in factory No. 120, September 4, 1882. If these cigars were made in and removed from any other manufactory in the United States, it is clear they were not stamped with the number of the proper manufactory, and the case is

directly within the statute, as they were not stamped with the number of the manufactory from which they were removed, at the time they were removed or at any other time.

The plaintiff in error contends that it was incumbent upon the government to show affirmatively that when the cigars were removed from the factory in which they were made they were not in boxes properly stamped, and that proof of their being found in the boxes seized does not establish the fact that they were in them when removed from the factory, and that it is to be presumed in favor of innocence that they were taken out of the original and properly stamped boxes and put in those where they were when seized. The exceptions to the findings of the court below raise this point, and it is the only point made by the exceptions which has any color of merit. The cigars could not have been removed from the original and properly stamped boxes and packed in those in which they were seized without violating some of the several stringent provisions of the internal revenue laws, and subjecting the offender to criminal punishment. The presumptions in favor of innocence, therefore, neutralize each other. Undoubtedly it is incumbent upon the government in such a case to show affirmatively the existence of every fact which is an element of the act made penal. This rule, however, does not require every conjecture which may be started by the fertility of counsel to be overthrown; it suffices, if, upon the evidence in the case, the existence of the facts can be legitimately presumed. Aside from any presumptions founded upon the observance of the statutory regulations, the natural and reasonable inference is that the cigars were removed from the factory in the condition in which they were found. It is not usual, after articles have been prepared for sale in the market, to remove the packages, wrappers, or boxes in which they are ordinarily prepared for sale, and substitute others unnecessarily. The presumptions drawn from the ordinary conduct of men and the usages of trade are often as cogent as direct evidence. They were sufficient here to make a *prima facie* case.

As the case was tried by the court below without a jury, the exceptions raised by the plaintiff in error to the findings of fact and law by the district judge cannot be reviewed, however meritorious they might be. *Town of Lyons v. Lyons Nat. Bank*, 19 Blatchf. 279; S. C. 8 FED. REP. 369; *Blair v. Allen*, 3 Dill. 101; *Wear v. Mayer*, 2 McCrary, 172; S. C. 6 FED. REP. 658. It has been deemed proper, however, to consider them, at the request of counsel, as they have been fully argued.

Judgment is affirmed.

FOLSOM v. UNITED STATES.

(Circuit Court, S. D. New York. July 26, 1884.)

1. INTERNAL REVENUE TAX--LEGACY AND SUCCESSION DUTIES--VESTED INTERESTS.

The estate of a person who, at the time of the passage of the act of congress of June 30, 1864, had already become entitled to and invested with an estate in fee in certain lands, subject to his father's life-estate, does not come within the operation of that act.

2. SAME--RETROACTIVE OPERATION NOT TO BE GIVEN LAW.

A retroactive operation is not to be given by construction so as to subject persons to a tax upon interests they may have acquired years before the act of June 30, 1864, was passed.

On Writ of Error.

De Forest & Weeks and *Geo. S. Sedgwick*, for plaintiff in error.

Elihu Root, U. S. Atty., and *W. W. Wood*, for defendant in error.

WALLACE, J. I am unable to agree with the construction placed on section 128 of the act of June 30, 1864, in the case of *Brune v. Smith*, cited by counsel for the defendant in error. When that act was passed, the plaintiff in error had already become entitled to and invested with an estate in fee in the lands in question, subject to his father's life-estate. The life-estate determined upon the death of the father in 1869, and all the plaintiff in error succeeded to after the act was passed, was the increase of benefit accruing by the extinction of the life-estate. Section 128 was obviously framed to meet just such a case. A retroactive operation is not to be given by construction, so as to subject persons to a tax upon interests they may have acquired years before the law was passed. The language of section 127 defines a succession as an interest in lands to which any person "shall become" beneficially entitled in possession or expectancy, and by section 133 the tax is imposed upon such a succession. When a person has a vested remainder he has become beneficially entitled. It might be maintained, if his interest was contingent and became vested by the death of another after the law was enacted, that he acquired a succession within the meaning of section 127.

The point which was considered by the court below, and which was the only question that the demurrer presented, was whether an assessment was a condition precedent to the right to collect the tax. That question was correctly decided upon the authority of *U. S. v. Tilden*, 9 Ben. 368; *U. S. v. Halloran*, 14 Blatchf. 1; *U. S. v. Erie Ry. Co.* 107 U. S. 1; S. C. 2 Sup. Ct. Rep. 83; *Dollar Savings Bank v. U. S.* 19 Wall. 227.

The complaint alleges the clear value of the succession at \$353,500. It is conceded by the United States attorney that this sum represents the value of the whole estate of the defendant, and not the increase of benefit accruing by reason of the extinction of the father's life-estate.

The defendant should have an opportunity to answer and reduce the recovery claimed.

It is ordered that the case be remanded to the district court, with directions to affirm the judgment, with costs, unless the defendant pays the costs of the demurrer and writ of error, withdraws the demurrer, and answers within 30 days.

COLLINS COMPANY v. COES and others.

(Circuit Court, D. Massachusetts. July 30, 1884.)

PATENT—COES WRENCH—COLLINS COMPANY v. COES, 5 BAN. & A. 548, OVERRULED.

The application to the bar of the Coes wrench, for the purpose of securing and supporting the step and resisting the strain, of a nut already in use for the same purpose on the Hewitt or Dixie wrench, lacks the novelty of invention requisite to support a patent, within the decisions of the supreme court at the last term, which, in effect, overruled the decision of this court in the suit of the *Collins Company v. Coes*, 5 Ban. & A. 548.

In Equity.

Thomas H. Dodge, (of Worcester, Mass.,) for defendants.

W. E. Simonds, (of Hartford, Conn.,) for complainant.

Before GRAY and NELSON, JJ.

GRAY, Justice. This is a bill in equity for the infringement of the first claim in the specification of the second reissue to the complainant, dated February 25, 1873, of letters patent originally issued to Lucius Jordan and Leander E. Smith, on October 10, 1865, for an improvement in wrenches.

The wrench, as described, both in the original patent and in the reissue, has the following parts: The wrench-bar, A, the upper part of which is of the usual shape, and has attached to it the movable jaw, B, and the lower part of which is of convenient form to receive upon it the wooden handle; a screw-rod, C, parallel to the main bar; a rosette, D, at the lower end of the screw-rod, by means of which the movable jaw is worked; a ferrule or step, E, having a hole through it for the admission of the bar, and a recess in its upper face as a bearing for the lower end of the screw-rod; a nut, F, screwed on a thread in the bar, under the step, and having a recess in its under face to receive the top of the wooden handle, G; and the wooden handle secured at its lower end to the main bar by a nut in the usual way.

Both the original patent and the reissue state that the object of the invention is to make the strain come upon the nut F, instead of coming upon the wooden handle. The original patent states that the nut F is, and the reissue states that it may be, screwed up firmly

against the step E. The reissue affirms and repeats that the distinguishing characteristic of the invention is that the step can be readily removed and replaced at pleasure. There is no hint of such a distinction in the original patent.

The first claim in the original patent is for "the step E, made substantially as described, and for the purpose set forth." The corresponding claim in the reissue is for "the step, combined with the wrench-bar, and supported by the nut F, or its equivalent, at the place where the step is connected with the bar, in such manner that the step can be removed from the bar without cutting or abrasion of parts."

The parallel screw-rod, with a rosette thereon to work the movable jaw, and resting upon a ferrule or step, had been introduced in the original Coes wrench, patented in 1841; and, long before the issue of the patent to Jordan and Smith in 1865, large numbers of the Hewitt or Dixie wrench had been made and sold, in which there was no separate screw-rod, and the screw that worked the movable jaw revolved on the main bar, but that screw rested on a ferrule or step, which was secured sometimes by driving it on under heavy pressure, and sometimes by a nut screwed under it on the bar.

The application to the bar of the Coes wrench, for the purpose of securing and supporting the step and resisting the strain, of a nut already in use for the same purpose on the Hewitt or Dixie wrench, lacks the novelty of invention requisite to support a patent, within the decisions of the supreme court at the last term, which have, in effect, overruled the earlier decision of this court in the suit of this complainant against Loring Coes and others, reported in 5 Ban. & A. 548. *Pennsylvania R. R. v. Locomotive Engine Safety Truck Co.* 110 U. S. 490; S. C. 4 Sup. Ct. Rep. 220; *Bussey v. Excelsior Manuf'g Co.* 110 U. 131; S. C. 4 Sup. Ct. Rep. 38; *Double-pointed Tack Co. v. Two Rivers Manuf'g Co.* 109 U. S. 117; S. C. 3 Sup. Ct. Rep. 105; *Phillips v. Detroit*, 111 U. S. 604; S. C. 4 Sup. Ct. Rep. 580.

The complainant's patent being void for want of novelty, it becomes unnecessary to consider the other defenses.

Bill dismissed, with costs.

THE FIRE-EXTINGUISHER CASE.

GRAHAM, Adm'r, etc., and another v. JOHNSTON and another.

(Circuit Court, D. Maryland. July 26, 1884.)

PATENTS FOR INVENTIONS—GRAHAM FIRE-EXTINGUISHER—SPECIAL ACT OF CONGRESS OF JUNE 14, 1878, GRANTING PATENT TO HEIRS—CONSTITUTIONALITY—EFFECT OF—PATENT SUSTAINED.

The act of congress approved June 14, 1878, relieving the heirs of William A. Graham from all disabilities preventing them from renewing or reviving an application filed by Graham in 1837 for a patent for a novel method of extinguishing fires, *held* to be a constitutional exercise of the power of congress; and *held*, that the patent No. 205,942, granted July 9, 1878, to Graham's administrator, was properly issued in pursuance of the authority given by that act of congress. *Held*, that the intention of congress was to allow the original application of Graham to be revived, and that this intention is sufficiently expressed in the act, and that the novelty of the invention for which the patent was granted is to be tested as of the date of original application filed in 1837. *Held* that, at the date of his application, Graham was the first discoverer that carbonic acid gas and water, when condensed in a sufficiently strong vessel, would propel itself by its own elasticity in a sufficient stream to a sufficient distance to be a useful agent for extinguishing fires, and that he described both a portable and a fixed apparatus by which his method could be applied with beneficial results. *Held*, that the claim in the patent granted to his administrator for this method or process of extinguishing fires is valid. *Held*, that the defenses set up against the patent—that it was granted for several distinct inventions, that the specifications are deceptive and misleading, and that it covers a different claim from that set forth in the application—are not valid objections.

In Equity.

Rufus W. Applegarth and L. L. Bond, for complainant.

I. F. Williams, Abraham Sharp, and R. K. Evens, for respondents.

MORRIS, J. This is a suit in equity for alleged infringement of patent No. 205,942, granted July 9, 1878, to Archibald Graham, administrator of William A. Graham, deceased, for a new method and an improved apparatus for extinguishing fires.

The claims are as follows:

"I do not claim to have discovered a new element in nature, nor do I claim to have discovered the abstract principle that carbonic acid gas will not keep up combustion. What I claim as new, and desire to secure by letters patent, is (1) the method or process of extinguishing fires by means of a properly directed stream of mingled carbonic acid gas and water projected by the pressure or expansive force of the mingled mass from which the stream is derived; (2) the combination of a strong vessel for containing the mixture of carbonic acid gas and water under pressure, with a stop-cock, flexible hose-tube, and a nozzle, substantially as and for the purpose specified; (3) the combination of fixed pipes or tubes, arranged by or through a building, with a stationary or fixed fountain or tank, for forcing mingled carbonic acid gas and water, by its own elasticity, through such pipes, substantially as specified; (4) an improved method of extinguishing fires, consisting—*First*, in condensing carbonic acid gas by artificial pressure or in generation; *second*, controlling it by a suitable vessel; and, finally, in directing its flow to the desired place, substantially as specified."

The original application of William A. Graham, of Lexington, Virginia, was filed in the patent-office, November 23, 1837, over 40 years

prior to the grant of the patent. In his application and specifications, Graham claimed that he had discovered that carbonic acid gas compressed in water in the proportion of ten or more volumes of gas to one of water, in portable fountains or fixed reservoirs, could be usefully applied to extinguishing fires, and that he had devised suitable apparatus by which a stream of gaseous water, by the elastic force of the gas, would be projected a distance of 40 feet, so as to quickly, cheaply, and effectually subdue the fire. He fully described what he claimed as his invention, and accompanied his specifications with diagrams and descriptions of his apparatus. The commissioner of patents refused to grant him a patent, upon the ground that the specifications were not found to contain any practicable device for carrying the alleged discovery into operation, and because it did not appear that it admitted of being carried into operation. Graham made many unsuccessful efforts to convince the commissioner that his plan was useful and practicable, but want of means and ill-health prevented his exhibiting in Washington the apparatus with which he expected to demonstrate its efficiency, and he died in 1857 without obtaining a patent. In 1869 a patent was granted by the United States to Carlier & Vignon, of Paris, France, (No. 88,844, April 13, 1869; reissued, No. 4,994, July 16, 1872,) for "an improvement in the art of extinguishing fires, by throwing upon the fire or conflagration a properly directed stream of mingled carbonic acid gas and water by means of the pressure or expansive force exerted by the mass of mingled gas and water from which the stream is derived." Carlier & Vignon had previously obtained patents in France and England, but the date of their invention was not shown to have been earlier than 1861. The portable apparatus described by them was substantially identical in principle and operation with the apparatus described by Graham. Suit having been brought on their reissued patent in the circuit court for the Eastern district of Pennsylvania, it was tried in April, 1874, before Circuit Judge McKENNA. To show want of novelty in the patent, the respondent in that suit put in evidence the identical apparatus constructed and used by Graham, and Judge McKENNA, in a carefully considered decision, held that it was clearly proved that Graham, as early as 1852 or 1853, had made a public trial of this very apparatus in Lexington, Virginia. He held that it was proved that Graham was, as he claimed to be, the first inventor "of an original method of extinguishing fires by the combined agency of carbonic acid gas and water, and that he perfected and adopted his invention by embodying it in the form of mechanical appliances, capable of operative and successful use." *Northwestern Fire-extinguisher Co. v. Phila. Fire-extinguisher Co.* 1 Ban. & A. 177. After the decision of this case the administrator of Graham, in 1876, filed in the patent-office another application for a patent for Graham's invention, but was refused upon the ground that in consequence of the long delay the invention had gone into public use.

These facts being brought to the attention of congress, an act was passed, approved June 14, 1878, for the relief of Graham's heirs. By that act the heirs of Graham were relieved from all disabilities preventing them from renewing or reviving an application by his administrator for a patent for a novel method of extinguishing fires. The administrator was authorized to renew the application, conforming it to present rules, and the commissioner of patents was authorized to issue letters patent for the *invention* or *inventions* set forth in the application, to have the same force and effect from its date as though no delay had occurred; provided, that all persons having machines, containing the inventions, in use should have the right to continue to use them without being liable for any infringement. Under the authority given by this act the patent on which this suit is based was issued, founded upon the original application of Graham, filed November 23, 1837.

It is contended by the respondents that this patent is void because congress had no constitutional power to pass the act; that as, by the general acts of congress on the subject of patents in force during the time between the filing of the original application and the passing of the special act, the applications of Graham and his administrator were declared abandoned, and all right to prosecute them was denied, it resulted that the public had acquired the right to use the inventions, and that right could not be taken away without the law being repugnant to the declaration of the constitution that no person shall be deprived of his property without due process of law. The theory of the encouragement given to inventors is that by disclosing under the regulations of law their discoveries they benefit the public, and the constitutional power of congress for securing to them the exclusive right to their inventions has only one restriction, viz., that it shall be for limited times. With regard to the terms upon which the exclusive right shall be granted, the time when the application for the original grant or for any renewal or extension of it shall be made, it has been frequently held that the regulations in these matters are merely self-imposed restrictions on the constitutional power of congress, which it can at its pleasure disregard in any particular case. Walker, Pat. § 255.

Special acts for the relief of particular inventors have often been passed by congress. *Evans v. Eaton*, 3 Wheat. 454. In the case of *Agawam Co. v. Jordan*, 7 Wall. 583, the supreme court sustained a patent which had been extended in pursuance of a special act of congress, passed more than 20 years after the original patent had expired, and the invention had been free to the public. The act of congress in that case was quite similar to the one under consideration, in that it authorized the commissioner to entertain the application for extension as though it had been made within the time prescribed by the general law. In *Blanchard v. Sprague*, 2 Story, 170, Mr. Justice STORY, speaking of the right of congress to grant a patent to an

inventor whose invention had, at the time of the passage of the act, gone into public use, says that the question is set at rest by *Evans v. Eaton*, and that he had never doubted the constitutional authority of congress to make such a grant.

The right which the public has acquired to use the thing invented, by reason of the applicant for a patent failing to do something prescribed by congress, and the necessity for which congress might, by previous legislation, have dispensed with, has never been held to be a vested right. The cases of *Evans v. Eaton*, *supra*; *Evans v. Jordan*, 9 Cranch, 199; *Bloomer v. Stolley*, 5 McLean, 161; *Jordan v. Dobson*, 2 Abb. (U. S.) 408, hardly leave this question debatable.

It is further contended by the respondents, in opposition to the validity of the complainant's patent, that as by its terms the act of congress relieved the heirs of the inventor from all disabilities, preventing them from renewing or reviving an application by the administrator for a patent, provided the alleged invention should be found to have been new and useful at the time of filing such application, that "the time of filing such application" means the filing of the application by the administrator, and, consequently, if the invention was not new at that date, the commissioner was not authorized to grant the patent. It would be a singular miscarriage of the obvious intention of congress if this was the necessary interpretation of the language used in the act. It was always conceded that at the date of the application made by the administrator, viz., February 19, 1876, the invention was not new. The strongest argument in favor of the relief given by congress was the fact that the patent granted to Carlier & Vignon in 1869 had been in 1876 declared void for want of novelty, because Graham's invention, which he had described in 1837, had been proved to have been successfully used as early as 1853. The purpose of the act is remedial and beneficial, and is to be so construed, if possible. I think the fair construction of it is that the heirs of the inventor are relieved from all disabilities which would prevent the administrator from renewing or reviving an application for a patent for a novel method of extinguishing fires. The administrator is authorized to renew said application, and the commissioner is authorized to grant letters patent for the invention or inventions contained in such application, if the alleged inventions should be found to have been new and useful at the time of filing such application. It is, I think, clearly intended and sufficiently expressed that the application which was to be revived or renewed was the application of the original inventor. Taking, then, the date of the filing of the original application and specifications, November 23, 1837, as the point of time to which is to be referred the question of novelty, there has been no testimony at all adduced tending to disprove novelty at that time, except the description of the Manby machine in the *Mechanic's Magazine*, London, 1824, pp. 28-31, and the English patent to Bakewell, issued March 8, 1832.

The contrivance described by Capt. Manby was intended for extinguishing fires. It was a small, portable air-tight vessel for holding water, (or water to which might be added some substance, such as pearlash, to increase its efficiency as an extinguishing fluid,) and into which atmospheric air had been pumped under sufficient pressure to cause the water to spurt out in a stream to the fire when the stop-cock was opened. The portable cylindrical vessel is quite similar in design to the portable strong vessel of Graham, but had no flexible hose tube and nozzle, and was apparently intended to be taken quite close to the fire. But we look in vain for any suggestion of the use of carbonic acid gas in connection with Capt. Manby's plan or apparatus. The English patent of March 8, 1832, to Bakewell is for an apparatus for making soda-water and other aerated waters. The substance of the invention was a device by which the gas could be conveniently generated in the fountain itself, and to assist in that operation the fountain was suspended between two upright standards, vibrating freely on two pivots, so as to pour the acid, contained in a vessel inclosed in the fountain, gradually upon the chalk or other substance from which the gas was to be generated. It is not only nowhere suggested that it could be used for extinguishing a fire, but the machine was so constructed as to prevent such a use. These are the only anticipating devices suggested which antedate the original application of Graham, and they do not seem to me to require further consideration.

The patent is further assailed by the respondents upon the ground (1) that the patent as granted is for several separate and distinct inventions, and therefore void; (2) that the specifications are deceptive and misleading, and therefore the patent is void; (3) that the patent covers an invention different from that set forth in the application.

As to the first point, the claims for which the patent was granted are four. The first and fourth are for the method of extinguishing fires by a properly directed stream of mingled carbonic acid gas and water escaping from pressure, and projected by its own expansive force; the second claim is for a portable apparatus by which the method or process could be usefully applied; and the third is for a stationary apparatus for the same purpose. If these are all proper subjects of claim, and are all inventions found in the application of Graham, then the language of the act of congress which authorizes the commissioner to issue a patent for whatever invention or inventions, where found in the application, is sufficient to justify his action. This was held sufficient in *Evans v. Eaton*, 3 Wheat. 506. It was decided by the supreme court in *Hogg v. Emerson*, 6 How. 483, that two or more patents may be united if they relate to a like subject, or are in their nature or operations connected together. Walk. § 180. The nature of the several claims of this patent is such that the granting of them in one patent, it seems to me, might be justified by this rule. But I incline to think that the substance of Graham's invention is

contained in the first claim, or in the first and fourth claims together, if there is any difference between them. He claims in his application that he is the first discoverer that carbonic acid gas condensed in water can be made, by the use of a suitable apparatus, a useful self-propelling agent for putting out fires. He then describes the construction and operation of a machine by which the gas may be generated, and also describes "one among the various modes by which it may be applied." After describing the apparatus used by him, he says: "Besides the portable apparatus, there are other ways or methods by which my invention or discovery may be carried into useful operation." The inventor was entitled to the exclusive use of the method or process discovered by him, and was bound only to describe some particular mode or apparatus by which the process could be applied with some beneficial result. *Tilghman v. Proctor*, 102 U. S. 729. I am inclined to doubt the validity of the second and third claims, if they are to be construed as patents for any particular form of apparatus or combinations of mechanical elements. There was nothing new in the portable apparatus intended to be covered by the second claim, (unless, perhaps, the flexible hose-tube,) except as applied to the use of carbonic acid gas and water; and the same may be said of the third claim. But if the first claim is valid, the fate of the second and third claims is not material,—certainly not in this case.

The second point of the objection used by respondents, that the specification and claims are deceptive and misleading, is sought to be supported by testimony that in actual use of the apparatus so little of the carbonic acid gas reaches the fire that its effect as an extinguisher is not appreciable; that the only use of the gas is the elastic force which it exerts in the fountain, to eject the water with sufficient force to make it reach the fire; that it is the water alone which acts as the extinguisher. So that it is urged that the pretension in the specification that the gas was an important agent in smothering the fire is false and misleading. The witnesses who testified on this point made experiments by catching the stream in open beakers at some distance from the fountain, and they differed very greatly as to the quantity of gas which was then found to remain commingled with the water. Some claimed that a large quantity of gas remained, and others none at all. These tests were not very satisfactory. The weight of the evidence is, however, very conclusive that a stream from a fountain charged with carbonic acid gas and water in the manner described by Graham is an efficient agent for the purpose of extinguishing small fires; that the apparatus can be kept at hand for use in a sudden emergency, and can be operated without delay and before the fire has acquired headway. It is true, as claimed by him, that carbonic acid gas combines in a remarkable degree with water, so that by moderate pressure the water can be made to receive six to twelve times its volume of the gas; that the fountains can be kept charged or made to generate the gas when

needed; that the gas has great elasticity; that it is heavier than air, and when combined with water has a specific gravity well adapted to pass in a stream through the air; that if any of the gas does by any means reach the flame or fire it will not support combustion, but has a direct operation in extinguishing the flame and checking the combustion. All these merits claimed by him have been tested in actual use for many years, and the utility of the invention has created a large demand for the apparatus. With the utility thus established, I can see nothing fatal to the patent in the fact, if fact it be, that the inventor may perhaps have overrated the importance of some of the elements of his method and underrated others.

With regard to the third point, that the patent is for a different invention from that described in the original application, after careful consideration I fail to see the force of the objection.

My conclusion is that Graham was, as is claimed for him, the pioneer in the art of using mingled carbonic acid gas and water to extinguish fires, and was the first to discover that when condensed in a sufficiently strong vessel it would propel itself by its own elasticity to a sufficient distance and in a sufficient stream to be a useful agent for that purpose, and that he described both a portable and fixed apparatus by which the result could be accomplished.

I hold the first and fourth claims of the patent to be valid, and in my judgment it is immaterial in this case whether my doubts as to the validity of the other claims are well founded or not.

There is no difficulty as to the infringement. The defendants can hardly be said to directly deny it in their answers. The defendant Johnston practically admits the making of six portable and six stationary machines, and says he desisted after being warned that they were infringements. The circulars and advertisements of the other defendant, in connection with the oral testimony, sufficiently show the infringement by it, and that the machines complained of contained the exact method of Graham, applied in substantially the same apparatus described by him.

The complainants are entitled to a decree in their favor, and to a reference for an accounting. See, also, *Fire-extinguisher Manuf'g Co. v. Graham*, 16 FED. REP. 543.

BALTIMORE CAR-WHEEL CO. v. NORTH BALTIMORE PASSENGER
RY. CO.

(Circuit Court, D. Maryland. July 14, 1884.)

1. PATENTS FOR INVENTIONS—REISSUE No. 9,881.

The third claim of reissued patent No. 9,881, September 27, 1881, to Joseph Harris, *held* void, because the reissue was after 14 years' delay, and after adverse rights had accrued.

2. SAME—REISSUE No. 3,243.

The first claim of reissued patent No. 3,243, granted December 22, 1868, to T. B. Stewart, if construed to cover the combination of two tubes fitting one within the other without flanges, and neither made oblong in shape, is void for want of novelty, if for no other reason.

3. SAME—INFRINGEMENT—LICENSE.

In a case in which the complainant, suing for infringement of his patent, does not proceed to enforce remedies under a license granted by him, but treats the license as no longer in force, a purchaser from the supposed licensee is not estopped from denying the validity of the patent; and in no case is a mere purchaser from a licensee estopped from denying the validity of the patent in a suit against him for infringement.

In Equity.

R. D. Williams and Benjamin P. Price, for complainant.

Bernard Carter and B. F. Thurston, for defendant.

MORRIS, J. This is a suit for the alleged infringement of two reissued patents for improvements in car axle-boxes, of which the complainant is owner by assignment, and which it is alleged that the respondent has infringed by using in its business certain car-wheels and axle-boxes which it purchased from the Bemis Car-box Company of Springfield, Massachusetts. The two patents as to which infringement is alleged are the reissue to T. B. Stewart, No. 3,243, dated December 22, 1868, the original being No. 71,241, dated November 19, 1867; and the reissue to Joseph Harris, No. 9,881, dated September 27, 1881, the original being No. 71,873, dated December 10, 1867. The Harris patent was reissued 14 years after the original had been granted, and the third claim, which is the only one drawn in question, first appeared in the reissue. This claim is for the combination with the neck or annular recess in the journal, and with the journal-box, of the key or shoulder made to slip on in the recess and straddle the journal, thereby keying the journal and the box together. The evidence is convincing that in the interval of 14 years between the original patent in which this device was not claimed and the reissue in which it was, the use of the key, shoulder, and recess in car axle-boxes had become general throughout the country; and it must be conceded, as was practically admitted in the argument of the case, that this claim comes within the rulings which hold that what is not claimed in an original patent is dedicated to the public, unless the patent is surrendered and reissued within a reasonable time and before adverse rights have accrued. *Miller v. Brass Co.* 104 U. S. 350; *James v.*

Campbell, Id. 356; *Clements v. Odorless Excavating Co.* 109 U. S. 641; S. C. 3 Sup. Ct. Rep. 525.

With respect to the Stewart patent, the reissue having been applied for only nine months after the granting of the original, the complainant contends that so far as the objection of unreasonable delay, and subsequently acquired rights in others, is concerned, it is free from any of the vices which the supreme court has held fatal to reissued patents.

The purpose of the devices described in the first claim of the Stewart patent is to prevent dirt and dust from getting access to the journals and boxes of car-axes, and this the patentee claimed to have accomplished by a novel form of box and car-wheel. Upon the side of the axle-box next to the wheel he formed a cylindrical projection, B, having an annular outwardly projecting flange, *a*, upon its end. Upon the car-wheel, on the side next to the axle-box, he formed a tubular projection, *c*, having an inwardly projecting flange, *b*, upon its end. The cylindrical projection on the box fits into the tubular projection on the wheel, and they are slipped one into the other, and the annular space left between the cylinder and the tube is obstructed by the outwardly and inwardly projecting flanges. Of this arrangement the patentee, in his specifications, says: "It will be seen that dust would have to pass around a very circuitous route before it could penetrate far enough to reach the bearings of the journal."

As part of the improvement described in his specifications, and claimed in the second claim, Stewart constructed crescent-shaped saddles for the bearings, in a peculiar manner, which required the outside of the tubular projection on the box to be made of an elliptical or oblong shape. His first claim in the original patent is for—

"(1) The combination of the tubes, B and C, with flanges, *a* and *b*, arranged upon the box and wheel, substantially as shown."

In the Stewart reissue patent the drawings and specifications are identical with the original, but the first claim is as follows:

"(1) The combination and arrangement of the *oblong* tube, B, on the box, and the tube, C, on the wheel, with or without the flanges, *a* and *b*, substantially as described."

It thus appears that the original claim was for the combination of the two tubes, (as the cylinder and tube may be called,) with flanges upon their ends, and the reissue seeks to cover the combination simply of the two tubes without the flanges.

The question of infringement by the respondent company is a very simple one. The wheels and boxes made by the Bemis Car-box Company, and bought and used by the respondent, have the two tubes without the flanges, and neither of them is "oblong." They do not infringe the first claim of the original patent, but they do infringe the first claim of the reissued patent, if it is valid, and if the "oblong" feature of it is immaterial.

The complainant contends that the word "oblong" in this claim is merely descriptive and not limiting, because making the tube on the axle-box oblong in the Stewart device had nothing to do with the dust-excluding feature, which was the subject of the first claim, and was merely a convenience for its use in connection with the peculiar crescent-shaped bearings, which had nothing to do with excluding dust, which were the subject of the second claim, and that the original patent contained and disclosed clearly the dust-excluding invention claimed in the reissue, viz., the combination of the two tubes, one fitting within the other to exclude dust.

If the first claim of the Stewart reissue be valid, and this the construction to be put upon it, then it becomes important to examine the defense of want of novelty set up by the respondent's answer, and to determine whether it was new and patentable, at the date of the Stewart patent, to combine the two tubes, without the flanges and without the oblong shape, one fitting within the other, for the purpose of excluding dust from the bearings of axles. In support of this defense the defendant has put in evidence the following letters patent, with illustrative models of the devices therein described: Crannell patent, No. 35,870, July 15, 1862; Beers patent, No. 48,899, July 25, 1865; Gillett patent, No. 52,561, February 13, 1866; Steele patent, No. 62,231, February 19, 1867; Mansell patent, No. 14,089, April 24, 1852. A careful examination of these devices, aided by the clear statement of their several characteristics contained in the expert testimony and in the brief of the learned counsel for respondent, satisfies me that this defense is made out. It was not new, and did not require invention at the date of the Stewart patent, to construct a wheel and axle so as to have a projection on one to fit into a tubular recess on the other, for the purpose of obstructing the entrance of dust between the bearings of the axle and the box. These patents show that it had been done in making carriage-wheels; that it had been applied to loose wheels for cars; and even if it be a fact that it had never before been applied to car-wheels fixed upon the axles, such an application would not require invention, and would be merely a double use. I think there can be no doubt that if the first claim of the Stewart reissue receives the construction contended for by complainant's counsel, and which is absolutely required to make the complainant an infringer, then it must be held void for want of novelty. This view of the state of the art would seem to have controlled the action of the commissioner of patents, who refused to grant the reissue, striking out the word "oblong," and gave as his reason: "The main tubes, B and C, without the subordinate flanges, *a* and *b*, is substantially the same as the ordinary carriage-hub and its projecting flange, and the arrangement and purpose are identical." It would seem, therefore, that there was nothing new in the Stewart device except the flanges, which were designed to increase the obstructions to the entrance of dust, and the oblong shape,

which admitted of the device being used in connection with the crescent-shaped saddles, which were the subject of his second claim.

This disposes of the case if the respondent is permitted to put its defense upon the invalidity of the complainant's patents.

It is, however, strenuously argued by complainant's counsel that the respondent is estopped from denying the validity of the Stewart patent, both the original and the reissue, because the Bemis Car-box Company, from which the respondent purchased the wheels and axle-boxes complained of, had recognized the validity of their patent by entering into a written agreement, in which it acknowledged that similar boxes made by it were infringements, and agreed to pay a sum in compensation therefor, and accepted a license to continue to make similar boxes under the reissued patent during its term, the complainant, however, reserving in that agreement the exclusive right to make the wheels and axles to be used with such boxes. With regard to this position assumed by the complainant, two things are to be observed: *First*, that it is not suggested anywhere in the bill of complaint; and *second*, that the present respondent is not pretended to have been a party to the written agreement. The bill of complaint makes no allegation whatever with regard to any license, and discloses nothing whatever with regard to it. It is, in form, the usual bill of complaint against an infringer praying for an injunction and an account of profits, and alleges that the respondent, "without license of your orators and against their will, and in violation of their rights, have used, etc., the said improvement."

The answer, after setting up the defenses of want of novelty and invalidity of the Stewart reissued patent, avers, upon information and belief, that the Bemis Car-box Company was, by the writing of January 25, 1881, licensed by the complainant to make the axle-boxes purchased by the respondent. To this answer the complainant filed a general replication. These pleadings show that the complainant, as the foundation of his case, treats the license as forfeited, and as no longer having any force or efficacy. It is true that in a case in which the licensor affirms the contract, and is pursuing his remedies under it, the licensee is estopped from denying the validity of the patent; but it cannot be declared void by one party, and yet estop the other. *Burr v. Duryee*, 2 Fisher, 283. But, without regard to the pleadings, I do not see how the proposition can be maintained that the respondent, who is not a party to the written agreement, can be estopped by its admissions. If the license is still in force, the complainant's only remedy is against the Bemis Car-box Company; if it is not in force, then the complainant was right in proceeding against the respondent as an ordinary infringer.

It is to be noticed, also, that the estoppel, to avail in this case, must go further than a mere acquiescence in the validity of the Stewart reissue: it must go to the extent of admitting that the wheels and boxes used by respondent are infringements, notwithstanding the ab-

sence of the "oblong" shape of the tube, which is one of the elements of the first claim of the reissue. As against the Bemis Company, complainant may perhaps contend successfully that this was admitted, and cannot now be denied by that company; but I am at a loss to see how and when this respondent admitted it, and estopped itself from denying it. An estoppel cannot arise unless it grows out of a transaction to which the person estopped is a party or privy, and I do not understand that one who may purchase a patented article from a licensee of the patentee can, from that fact alone, be held bound by the license or its recitals, or that it establishes any contractual relations between such a purchaser and the patentee.

Bill of complaint dismissed.

WOOSTER v. HANDY.

(Circuit Court, S. D. New York. July 22, 1884.)

1. EQUITY—PRACTICE—RULE 88,—REHEARING.

Rule 88 of the equity rules prescribed by the supreme court of the United States, provides for a rehearing after a final decree of an appealable character.

2. SAME—INTERLOCUTORY DECREES.

Interlocutory decrees remain under the control of the court and subject to its revision until the whole matter in controversy is disposed of by final decree.

3. SAME—EFFECT OF SUPREME COURT DECISION AFTER INTERLOCUTORY AND BEFORE FINAL DECREE.

When, after an interlocutory decree, and before a final decree in a case, the supreme court renders a decision affecting the case, this court will make its final decree in accordance with the decision of the supreme court, and as if that decision had been made before any decision in the case.

4. PATENTS FOR INVENTIONS—REISSUES—REQUISITES FOR.

Where, by an application for the reissue of a patent, it is sought merely to enlarge a claim, a clear mistake and inadvertence must be shown, and a speedy application for its correction, without unreasonable delay, must be made.

5. SAME.

Where, by the reissue of a patent, it is sought merely to enlarge a claim, a patentee cannot wait until other inventors have produced new forms of improvement and then apply for an enlargement embracing the new forms.

6. SAME—DELAY IN REISSUE OF PATENT—WHEN COURT TO DECIDE UNREASONABLE.

Where it is apparent, from a comparison of the patents, that a reissue is made to enlarge the scope of the patent, the court may decide whether the delay in obtaining the reissue was unreasonable, and the reissue void.

7. SAME—INFRINGEMENT OF PATENTS—BILL, WHEN DISMISSED.

Where a reissue of a patent is sought merely to expand its claims so as to embrace structures brought into use between the time of the issuing of the original and the time of the application for the reissue, and which were not infringements of the claim of the original, there being no proof of mistake or inadvertence, the right to a reissue is lost by a delay of more than 12 years, and, the reissue being made and suit brought for the infringement thereof, the bill will be dismissed.

8. SAME—DEATH OF INVENTOR—EFFECT ON REISSUE OF PATENT—ASSIGNEE—RIGHTS OF—REV. ST. § 4895.

After the death of the inventor, a reissue of the patent may be obtained upon application made, and a corrected specification signed by the assignee, under Rev. St. § 4895.

In Equity.

Frederic H. Betts, for plaintiff.

Benjamin F. Lee, John Dane, Jr., and William H. L. Lee, for defendant.

BLATCHFORD, Justice. This suit is brought on two reissued patents. One is reissue No. 6,565, granted to George H. Wooster, July 27, 1875, (on an application for a reissue filed June 22, 1875,) for an "improvement in machines for making ruffles," the original patent, No. 37,550, having been granted to Pipo and Sherwood, January 27, 1863, on the invention of John A. Pipo. The other is reissue No. 6,566, granted to George H. Wooster, July 27, 1875, (on an application for a reissue filed July 19, 1875,) for an "improvement in sewing-machines for making band-ruffling," the original patent, No. 46,424, having been granted to E. C. Wooster, February 14, 1865, on the invention of Thomas Robjohn. The case was brought to a hearing on pleadings and proofs, and a decision was rendered in April, 1881, (*Wooster v. Blake*, 8 FED. REP. 429,) in favor of the plaintiffs, on both patents, on which an interlocutory decree was entered, April 30, 1881. The decree adjudged that No. 6,565 was valid so far as claims 1, 7, 8, and 10 were concerned; that those claims had been infringed; and that an account of profits and damages should be taken as to such infringement. It stated that, as No. 6,565 had expired by its own limitation, no injunction was granted in reference to it. The decree also adjudged that No. 6,566 was valid so far as claims 8 and 9 were concerned; that those claims had been infringed; that an account of profits and damages should be taken as to such infringement; and that a perpetual injunction should issue as to said claims. The decree further said: "No adjudication is herein made as to any other claims than those above mentioned, of either of said letters patent, in any respect;" and it reserved the question of costs, and of increase of damages, and all further questions, until the master's report should come in.

The defendant's rufflers involved, and held, by the decision, to infringe both patents, were known as the Johnston ruffler and the Toof ruffler, and were sold to be attached to sewing-machines, for ruffling purposes. In regard to the Pipo patent, No. 6,565, the decision considered several patents and inventions set up on the question of novelty, and held that they could not avail. On the defense of the invalidity of the reissue, as not for the same invention as the original, the decision said: "There is no evidence that anything is found in the reissue No. 6,565, which is not to be found in the description or drawing of the original patent, or in the model accompanying the ap-

plication for that patent." As to the Robjohn patent, No. 6,566, the decision considered the question of novelty, and sustained the patent. Although the defense that the reissue was not for the same invention as the original was set up and urged, and it was considered and overruled, no special observations were made in the decision, in regard to it. The remarks in regard to the Pipo reissue were considered as applying to it.

Some progress was made in taking testimony on the accounting before the master, when, on the ninth of January, 1882, the cases of *Miller v. Brass Co.* 104 U. S. 350, and *James v. Campbell*, Id. 356, were decided by the supreme court. The defendant thereupon presented to this court, on March 22, 1882, a petition, with notice of an application to be made March 31, 1882, that the prayer of the petition be granted. The application was adjourned and not heard till June, 1884. The petition states that the said decisions in 104 U. S. "fix and establish rules of law in respect to reissues, different from those stated in numerous decisions of the circuit court of the United States for the Second circuit in numerous earlier cases; that said decisions of the supreme court are directly in point, as affecting the validity of the said Pipo and Robjohn reissues; and that the said Pipo reissue and the said Robjohn reissue must be declared void in accordance with the doctrines laid down in said cases." One of the prayers of the petition is for a rehearing of the cause on the questions of law involved, in view of the said decisions of the supreme court, and that the interlocutory decree be opened.

The rehearing asked for is not such a rehearing as is the subject of rule 88 of the equity rules prescribed by the supreme court. That rehearing is one after a final decree, after a decree which is of an appealable character. The present decree is not an appealable decree. The rehearing asked for is a reconsideration of the law of the case on the question of the validity of the reissues, in view of the decisions by the supreme court referred to. The test applied by this court, as announced by it in deciding the case, was that the reissues were to be sustained as to their claims, inasmuch as there was nothing found in them which was not found in the descriptions or drawings of the original patents, or in the models accompanying the applications for those patents.

The principle, the application of which is invoked by the defendants, is well settled. In *Perkins v. Fourniquet*, 6 How. 206, 209, it is said, that interlocutory decrees remain under the control of the court and subject to its revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy are disposed of by a final decree. In *Fourniquet v. Perkins*, 16 How. 82, there were an interlocutory decree, an accounting under it, a report of a master, exceptions to the report, and an argument thereon. On the argument, the circuit court reconsidered the opinion it had expressed on the merits in the interlocutory decree, and,

believing that opinion to be incorrect, dismissed the bill. The plaintiff appealed to the supreme court, and that court held the decree of dismissal to be right. It added:

"The counsel for the appellants, however, objects to the decree of dismissal, because it was made at the argument upon the exceptions to the master's report, and is contrary to the opinion on the merits, expressed by the court in its interlocutory order. But this objection cannot be maintained. The case was at final hearing at the argument upon the exceptions, and all of the previous interlocutory orders in relation to the merits were open for revision and under the control of the court."

This court, then, is to interpret the law of reissues as it would have done if the cases referred to had been decided by the supreme court before this court made its decision in this case. The rule laid down by the supreme court is, that where it is sought merely to enlarge a claim, there must be a clear mistake and inadvertence, and a speedy application for its correction, with no unreasonable delay; that, in such a case, a patentee cannot wait until other inventors have produced new forms of improvement, and then apply for such an enlargement of his claim as to make it embrace those new forms; and that when it is apparent, from a comparison of the two patents, that the reissue is made to enlarge the scope of the patent, the court may decide whether the delay was unreasonable, and the reissue, therefore, void. This view has been repeatedly asserted and applied by the supreme court in numerous cases decided since those in 104 U. S.

As to the Pipo reissue, No. 6,565, it is plain that the right to reissue was lost by the delay of more than 12 years, because the case is one of a mere expansion of the claims, beyond anything stated in the original patent as the invention, and with no proof of mistake or inadvertence, and it is sought to make the new claims embrace, in this case, structures brought into use between the time of the issue of the original patent and the time of the application for the reissue, and which were not infringements of the claim of the original patent. There was but one claim in the original. There are 13 in the reissue. It would serve no useful purpose to enlarge on this subject as to No. 6,565, for the counsel for the plaintiff concedes that, under the reiterated decisions of the supreme court, this court must dismiss the bill as to that reissue.

But in regard to the Robjohn reissue, No. 6,566, the plaintiff contends that the case is different; that claim 2 of the original patent covered the defendant's structures; that claims 8 and 9 of the reissue are substantially only repetitions of claim 2 of the original; or that, at least, claim 2 of the original was so worded as to be ambiguous, and so inoperative, and claims 8 and 9 of the reissue are valid, as removing the ambiguity. The specifications of the original and reissued patents are as follows, the parts in each which are not found in the other being in italics:

ORIGINAL.

"Be it known, that I, Thomas Robjohn, of the city, county, and state of New York, have invented a *new and useful improvement* in machinery for making band-ruffling; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings forming part of this specification, in which

"Figure 1 is a top view of my invention and of the bed-plate of a sewing-machine, to which it is applied. Figure 2 is a longitudinal vertical section of the same. Figures 3 and 3* are opposite end views of the ruffling machinery. Figures 4 and 4* are transverse sections of the band-folder. Figure 5 is a top view of the guides without the ruffling knife. Figure 6 is a section of the plaiting or ruffling device, parallel with Fig. 2, but showing the knife in a different position. Figure 7 is a face view of a ruffle made by the machine. Figure 8 is a transverse section of the same.

"Similar letters of reference indicate corresponding parts in the several figures.

"This invention consists in the combination, with a sewing-machine, of a novel system of guides, and a plaiting or ruffling knife, whereby one strip of muslin or cloth has both edges turned in, and is folded longitudinally, to form a double band, and plaited or formed into a ruffle, and the band and ruffle are sewed together,

REISSUE.

"Be it known, that I, Thomas Robjohn, of the city, county, and state of New York, have invented *certain improvements* in machinery for making band-ruffling, of which the following is a specification:

"This invention relates to improvements in rufflers for use with sewing mechanism, and consists in a ruffling blade or knife adapted to engage a strip of material to be ruffled, in combination with a feeding mechanism adapted to operate against the strip to which the ruffled strip is connected; also, in the combination, with a ruffling blade, of a guide for a strip to be ruffled, and also with a guide to fold and present a band about the edges of the ruffled strip, as is hereinafter more fully described, such folding guide also being adapted to hem or turn the edges of the folded band.

"Figure 1 is a top view of the invention, showing its arrangement upon the bed-plate of a sewing-machine. Fig. 2 is a longitudinal vertical section of the same. Fig. 3 and 3* are opposite end views of the ruffling machinery. Fig. 4 and 4* are transverse sections of the band-folder. Fig. 5 is a top view of the guides without the ruffling knife. Fig. 6 is a section of the plaiting or ruffling device, parallel with Fig. 2, but showing a different position of the same. Fig. 7 is a face view of a ruffle made by the machine, and Fig. 8 is a transverse section of the same. Figure 9 is a section of the presser, taken at right angles to the line of feed, showing the under surface cut away, to allow the passage of a hem on the ruffle.

"Similar letters of reference indicate corresponding parts in the several figures.

"As illustrated in the drawings, one strip of muslin or cloth has both edges turned in, and is folded longitudinally, to form a double band, and another strip is plaited or formed into a ruffle, and the band and the ruffle are both sewed together at the same time, thus forming a band-ruffle at one operation.

all at the same time, thus forming a double band-ruffle at one operation.

"To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

"A is the bed-plate of the sewing-machine. B is the guide by which the turning in of the edges of, and the longitudinal folding of, the band, *a*, of the ruffle are performed, said guide being attached rigidly to the gauge-plate, C, and secured to the bed-plate, A, by a screw, D, and steady pins, *b*, *b*. This guide, B, is made of brass or other metal, and has one end of the form of a tube, and nearly flat, as shown in figure 3, the width of the said tube being equal to the width of the strip of cloth of which the band, *a*, of the ruffle is to be formed, such strip being shown in section, in red color, in figure 4, 4*. At a short distance from the end shown in figure 3, one side of the tube is cut away, leaving the guide in the form of a transversely curved plate, with its edge turned over on the concave side, as shown in figure 4, and towards the other end its curvature increases, and the turning in of the edges is increased until the plate is in the form of the letter V, or nearly double, and its edges have a complete double turn, as shown at *c, c*, in figure 4*, so that the strip, entering at the end shown in figure 3, and being drawn through, will come out folded along the center, and with both edges turned in, as shown in red outline, in figure 4*.

"The arrangement of this guide upon the sewing-machine is such that this folding of the band may be effected in the movement of the latter towards the needle by the ordinary feeder, *r*, of the machine. The marginal portions, *c, c*, of the folder, by which the edges of the band are turned inward, do not extend quite to the needle-hole, *d*, but are cut away at some distance therefrom, as shown at *s*, in figures 1, 3*, and 5, though the

"To enable others skilled in the art to make and use my invention, I will now proceed to illustrate the most complete and perfect form of its operation, as combined with a sewing-machine.

"At A is represented the bed-plate of a sewing-machine. B is the guide by which the turning in of the edges of, and the folding of, the band, *a*, of the ruffle is performed, said guide being attached to the gauge-plate, C, and secured to the bed-plate, A, by a screw, D, and steady pins, *b, b*. This guide, B, is made of brass or other metal, and has one end formed as a tube, and of a width substantially equal to the width of the strip of cloth of which the band, *a*, of the ruffle is to be formed. The receiving end of this guide is shown at Fig. 3, and, at a short distance from such end, one side of said tube is cut away, leaving the guide in the form of a transversely curved plate, with its edge turned over on the concave side, as shown in Fig. 4, and towards the other end its curvature increases, and the turning in of the edges is increased, until the plate is in the form of the letter V, or nearly double, and its edges are given a double turn, as shown at *c, c*, in Fig. 4*, so that the band or plain strip to which the ruffle is to be united by stitches, when entered at the end shown in Fig. 3, and drawn through the guide, will come out folded along the center, and both edges may be turned in or hemmed, as shown in Fig. 4*, provided the strip is wide enough to extend into and entirely fill the width of the guide.

"The arrangement of this guide upon a sewing-machine is such that this folding of the band may be effected as the band is moved towards the needle by the feeding device, *r*. The marginal portions, *c, c*, of the folder, by which the edges of the band are turned inward, do not extend quite to the needle-hole, *d*, as shown at *s*, in Figs. 1, 3*, and 5, though the guide which produces the central fold has a nose, *e*, extending some distance

portion which produces the central fold extends some distance beyond the needle-hole, to preserve the form of the fold while the stitching is being performed.

"E is a guide for the strip of cloth of which the ruffle, *e*, is to be formed, consisting of a flat metal tube, of a width equal to that of the said strip, arranged in front of, and partly within, the folding guide, B, parallel with the feed movement, to deliver the strip between the two edges of the band, as the latter issues from the said guide, B, and approach the needle.

"This guide has a slight downward inclination towards the needle, and its lower end rests on the bed-plate close to the feeding device and the needle-hole, and its bottom part, *i*, is made with projections, *f, f*, to enable it to pass between and at the sides of the toothed surfaces of the feeding dog.

"The upper part of the said guide has near its sides two longitudinal slits, *g, g*, commencing at a short distance from the end furthest from the needle-hole, and extending to the end next the needle, and the end of the tongue, *h*, thus formed, is made to press upon the strip, in passing through the guide, and so keep it flattened, and produce friction enough upon it to keep it straight, on its way into the band. The said tongue, *h*, is shortened so that it does not extend so near to the needle-hole, by from a quarter to three-eighths of an inch, as the bottom part, *i*, of the guide, (see Fig. 2,) thereby leaving the said part, *i*, exposed for the plaiting or ruffling knife, *F*, to work upon, as will be presently described. This guide, *E*, is attached rigidly to the lower part of the guide B.

"The plaiting or ruffling knife is made with a straight and moderately sharp, but not a cutting, edge, of a length equal to the width of the strip of which the ruffle is to be composed, the said edge being arranged at right angles to the feed movement. The said knife is attached by an elastic shank, *j*, to a bent lever, *G*, the said shank keeping the edge pressed hard

beyond the needle-hole, to preserve the form of the fold in the band while the stitching is being performed.

"E is a guide for the strip of cloth of which the ruffle is to be formed, consisting of a flat metal tube, of a width equal to that of the said strip, and it is shown as arranged in front of, and partly within, the folding guide, B, parallel with the feed movement, and adapted to deliver the ruffled strip between the two edges of the band, *a*, as the latter issues from the said guide, B.

"The bottom plate, *i*, of the guide serves as the support for the strip or material to be ruffled, separates it from the fabric to which it is to be united, and the ruffling blade, acting on such material to be ruffled, carries it forward over the support, *i*, and presents it in a folded condition to the stitching mechanism. This bottom plate, *i*, is made with projections, *f, f*, to enable it to pass between and at the sides of the toothed surfaces of the feeder, *r*; and the upper part of the said guide has formed in it two longitudinal slits, *g, g*, commencing at a short distance from the end furthest from the needle, and extending to the end next the needle, the end of the tongue, *h*, thus formed, being adapted to press upon the strip passing through the guide with sufficient force to keep it flattened and straight, on its way to the action of the ruffling blade. The said tongue, *h*, does not extend so near to the needle-hole as the bottom plate, *i*, (see Fig. 2,) thereby leaving the said plate exposed for the plaiting or ruffling blade or knife to work upon, as will be presently described.

"The plaiting or ruffling blade or knife is generally made with a straight and moderately sharp, but not a cutting, edge, of a length equal to the width of the strip of which the ruffle is to be composed, the said edge being arranged at right angles to the feed movement, and connected with, or forming part of, an elastic shank, *j*, attached to a bent lever, *G*. In its

down upon the bottom part of the guide, and holding the knife with a downward inclination towards the needle-hole, at an angle of about 30° to the surface of i.

"The lever, G, works on a fixed fulcrum, t, at the back of the bed-plate, and derives motion, in one direction, from the rod which works the needle-arm, and, in the opposite direction from a spring, I, or has imparted to it, by any other mechanical means, the necessary motion to produce a movement of the knife *upon the bottom, i, of the guide, E, towards and from the needle-hole, d.* This movement of the lever may be varied by means of a set-screw, to give the knife a greater or less movement, according as finer or not so fine plaiting or ruffling is desired, the movement of the knife requiring to be as much greater than the feed movement as the intended width of the plaits. This knife commences its movement before the feed, and, when the knife has moved a distance equal to the intended *width* of the plaits, the feed movement commences, and the movement of the knife continues at the same speed as the feed movement, while the *latter* carries both band and ruffle *towards the needle.*

"The presser, H, of the sewing-machine, to which my invention is applied, is made of a width sufficient to cover the whole width of the ruffle, and a sufficient portion of the band; but it is made shorter than usual at the end where the work enters beneath it, in order to allow the knife to come close or nearly close to the needle; and its under side is beveled at that end, to allow the knife to pass under and push the plaits under it, as it gathers them up by its movement *towards the needle.* The operation of gathering up the plaits is illustrated in figure 6, where the strip which forms the ruffle is shown in red color.

"The sewing-machine in connection with which this invention is ap-

forward movement the edge of the ruffling blade or knife is pressed upon the support or plate, i, between the front part of which and the knife the strip to be ruffled is held.

"The lever, G, works on a fixed fulcrum, t, at the back of the bed-plate, and derives motion in one direction from the rod which works the needle-arm, and in the opposite direction from the spring, I, or has imparted to it, by any other mechanical means, the necessary motion to produce a movement of the *blade or knife.* This movement of the lever may be varied by means of a set-screw, to give the knife a greater or less movement, according as finer or not so fine plaiting or ruffling is desired, the movement of the knife requiring to be as much greater than the feed movement as the intended width of the plaits. This knife commences its movement before the feed, and, when the knife has moved a distance equal to the intended *widths* of the plaits, the feed movement commences, and the movement of the knife continues at the same speed as the feed movement, while the *feeding device* carries *forward both the band, or plain part to which the ruffle is attached, and the ruffle.*

"The presser, H, which, as shown, is the foot of a sewing-machine, is represented of a width substantially equal to the width of the blade or knife, or sufficient to cover the whole width of the ruffle, and a sufficient portion of the band; but it is made shorter than usual at the end where the work enters beneath it, in order to allow the knife to come close or nearly close to the needle; and its under side is beveled at that end, to allow the knife to pass under and push the plaits under it, as it gathers them up by its movement. The lower surface is recessed or cut away at the side, as shown at m, in Fig. 9, to allow the hem of the ruffle (Fig. 8) to pass under without lifting the presser from the rest of the goods; and the foot is also recessed at n, to receive the band of the ruffle.

"The sewing-machine in connection with which this invention is ap-

plied may be of any of the kinds in common use.

"To set the invention in operation, the strip of cloth to form the band, *a*, is inserted through the guide, *B*, and the longer strip, to form the ruffle, (which has been previously hemmed along one edge,) is inserted through the guide, *E*, and under the knife, *F*, and with its hemmed edge in front or outward, and the ends of both strips brought under the presser, and, when the presser has been let down upon them, the machine is set in operation *as for ordinary sewing*. As the two strips are drawn forward by the *feed movement*, the band is folded and has its edges turned in, and the *ruffle strip* is delivered *into the fold of the band*, and *ruffled* by the action of the knife, as hereinbefore described, and *sewed into the band* by the needle passing through both the upper and lower parts of the band close to the edges thereof.

"In the ruffling operation, the knife, *F*, is prevented from acting on the under part of the band, by the extension of the lower part, *i*, of the guide, *E*, beyond the upper part and below the knife, the said part of the band passing under the extended portion of *i*, and the ruffle strip passing over it for the knife to act upon, and the said extended portion protecting the lower part of the band from the action of the knife."

plied may be of any of the kinds in common use.

"To set the invention in operation, the strip of cloth to form the band, *a*, is inserted through the guide, *B*, and the longer strip, to form the ruffle, (which has been previously hemmed along one edge,) is inserted through the guide, *E*, and under the *ruffling blade or knife*, and with its hemmed edge in front or outward, and the ends of both strips are brought under the presser, and, when the presser has been let down upon them, the machine is set in operation. The two strips are drawn forward by the *feeding device*, the band is folded and has its edge turned in, and the strip *resting on the support, i*, is *ruffled*, delivered to the *unruffled material* or the band, by the action of the knife, as hereinbefore described, and the *ruffled and plain fabric are united by the stitching mechanism of the sewing-machine*, the needle, when operating with the band, passing through both the upper and lower parts thereof, close to the edges of the band.

"In the ruffling operation the *blade or knife* is prevented from acting on the band or plain fabric beneath the ruffle, by the support or plate, *i*.

"No claim is made to an open guide in combination with ruffling mechanism, as that is the form of gages which has been previously used; nor to a separating device, except in combination with the ruffling mechanism arranged and operated above the table.

"The ruffled strip may be stitched, as formed, on to a plain fabric introduced under the guide, *E*, and between the support or plate, *i*, and the feeder, *r*, the latter engaging and moving the plain fabric with the ruffle attached, while the ruffling knife or blade engages only the strip to be gathered, and carries it forward to the needle.

"The end of the arm, *G*, carrying the ruffling blade, is turned backward at *g'*, moves back and forth above the guide, and permits the blade carried by such arm to operate under the edge of the plain, unruffled material laid on top of the ruffled strip. As the blade moves forward, it first engages the material to be ruffled resting on

the supporting and separating plate, just at the end of the tongue, h, and, as the blade moves forward the material to be ruffled, its edge is held or pressed firmly against the material, and, when the fold made in the material is properly formed for the action of the needle, then the blade is retracted, and, as it returns to its backward position, the pressure of its end on the piece to be ruffled is lessened. The end of the ruffling blade moves beyond the edge of the supporting or separating plate, and carries the fold forward, in the ruffled strip, beyond the edge of said plate, and, on the return of said blade, the end of the supporting or separating plate, between which and the blade the material rests, is held by the end of said plate, i, preventing the plate, in its backward movement, from carrying back with it the fold formed in the strip to be ruffled.

"I am aware that a rough-surfaced feeder and ruffler have been employed to engage a piece of material to be ruffled, forming the gather in and moving the ruffled piece forward, the ruffler and feeder both engaging the ruffled strip, and, in connection with such mechanism, a separator has been employed to separate a band from the ruffled strip, the band being laid on the surface of the ruffled strip engaged on its under side by the ruffler and feeder made as four-motioned feeding devices; and I am also aware of United States patent No. 14,475.

"I do not claim, as the invention of Thomas Robjohn, a flexible ruffling blade adapted to operate on a strip to be ruffled when sustained on the cloth-plate of a sewing-machine; nor do I claim such a blade combined with a guide to present a single unfolded band strip to the ruffled strip; nor do I claim such a blade connected with and operated by a rocking arm or lever moved from a vibrating member of the needle-operating mechanism, and controlled as to its backward movement by a set-screw; nor do I claim any of the specific combinations of devices claimed in an application filed June 22, 1875, for reissuance of United States patent No. 37,550,

granted to John A. Pipo, January 27, 1863, said combinations of devices, as expressed in such reissue claims, being the invention of the said Pipo."

The original Robjohn patent had two claims, as follows:

"1st. The combination with each other and with a sewing-machine, of a guide for turning in the edges of and folding one strip of cloth to form a double band, a guide for guiding another strip of cloth into such band to form a ruffle, and a plaiting or ruffling knife, the whole operating substantially as herein specified. 2d. In combination with the ruffling knife acting above the strip which is to form the ruffle, I claim the extension of a portion of the bottom, *i.*, of the guide, E, or its equivalent, below the said knife, in such a position as to be interposed between the ruffle strip and the lower part of the band, substantially as and for the purpose herein specified."

The reissue has 18 claims, as follows:

"(1) In a ruffling or plaiting mechanism, the combination of a ruffling or plaiting blade with a folding guide, whereby a strip of any suitable fabric may be properly guided to form and fold a band about the edge of a ruffle, substantially as described. (2) The combination of a ruffling or plaiting blade and folding guide for properly directing the strip to form and fold a band about the edges of a ruffle, with stitching or sewing mechanism, substantially as described. (3) In a plaiting or ruffling mechanism, the combination of a guide having an inclosed channel-way, for properly directing the strip to be ruffled, with the plaiting or ruffling blade, substantially as described. (4) The combination of a plaiting or ruffling blade and an inclosed channel-way or guide for properly directing the strip to be ruffled, with a stitching or sewing mechanism, substantially as described. (5) The combination of a plaiting or ruffling blade and guide for properly directing the strip to be ruffled, and a folding guide for conducting a separate strip to form and fold a band on the edge of the said ruffled strip, with sewing mechanism adapted to unite the band and ruffle, substantially as described. (6) The combination with a ruffling or plaiting blade of a guide for conducting a strip to form a band for the ruffle, and adapted to fold or hem both edges of said band. (7) The combination of a ruffling or plaiting blade, a guide adapted to conduct a strip to form a band and to fold both edges of said band, with a sewing mechanism, substantially as described. (8) The combination of a ruffling or plaiting blade or knife, arranged and operated above the cloth-plate, with a supporting or secondary plate, separate from the cloth-plate, between which and the blade or knife the fabric to be ruffled is held and advanced by the blade, substantially as described. (9) A plaiting or ruffling blade, arranged above the cloth-plate of a sewing-machine, and adapted to operate upon a surface other than such cloth-plate, whereby a strip of goods can be plaited or ruffled above a plain piece, substantially as described. (10) In a ruffling or plaiting mechanism, a presser or holder, cut away at its lower side to permit the passage of a hem, substantially as described. (11) A folding guide, adapted to conduct and fold a band, and provided with a nose or extended portion, to direct and hold the band after it is folded, substantially as described. (12) The inclosed guide, in combination with the flexible tongue, adapted to press upon the goods passing through said guide, to keep said goods flattened and straight, substantially as described. (13) In a ruffling mechanism, the combination of a blade adapted to engage and fold or ruffle one piece of material, with a feeder adapted to engage and move forward the unruffled material, on which the ruffled material is delivered and secured by stitching, substantially as described. (14) In a ruffling or plaiting mechanism, the combination of a plate adapted to separate the material to be ruffled from the unruffled

material to which it is to be attached, with a reciprocating blade, adapted to press upon and engage the upper side of the material to be ruffled, to move forward with such material and present a fold for the action of the needle, and, on the return stroke of the blade, to relax its pressure on the material to be ruffled, substantially as described. (15) The combination of the ruffling-blade, adapted to move forward beyond the end of the supporting or separating plate, with the separating plate, adapted to retain the ruffled material from returning with the ruffling blade, substantially as described. (16) The combination of a guide, adapted to control each edge of the piece to be ruffled, and a ruffling or plaiting blade, having its edge extended across the material to be ruffled, with a solid or rigid pressing surface or holder, of a width to cover and flatten the ruffled or plaited material, substantially as described. (17) The combination, with a mechanism adapted to form a ruffle or plait, of a guide, provided with an inclosed channel-way, to guide the strip intended to be ruffled or plaited. (18) The combination, with a separator and a ruffling blade, of guides adapted to control and present the band, forming edges both above and below the strip to be ruffled, whereby a piece of fabric may be ruffled between two surfaces."

The original Robjohn patent does not anywhere in the statement of invention, or in any claim, suggest that his invention was anything else but the invention of mechanism for making a band-ruffle by means of two automatic guides, one to fold in the band and the other to guide the strip to be ruffled; or that he had invented a separator plate, or any means of ruffling a strip above a plain piece. The statement of the invention, in the original patent, is that it consists in combining the guides and the knife with a sewing-machine, the result of the joint action being that one guide, B, turns in both edges of a band and folds it longitudinally, so as to make a double band of it, and the other guide, E, which is a tubular guide, guides the strip to be ruffled and delivers it between the two edges of the band as they issue from the guide, B, and the knife makes the ruffle, and the two parts of the band and the ruffle are then sewed together by the needle, and a band-ruffle is formed. The real meaning of the original specification is best understood by seeing the alterations made in the reissue. There is in the latter a statement that the invention "consists in a ruffling blade or knife, adapted to engage a strip of material to be ruffled, in combination with a feeding mechanism, adapted to operate against the strip to which the ruffled strip is connected." This is new, and is in addition to a combination of the knife and the two guides. In the original the part *i* is the "bottom part" of the guide, B; but in the reissue it is called a plate, and a support, which separates the material to be ruffled from the fabric to which it is to be united. In the original the guide E is said to be attached rigidly to the lower part of the guide B. This is omitted in the reissue. In the original the tongue, *h*, of the guide, E, is said to press on the strip to be ruffled, so as to keep it straight "on its way into the band;" but in the reissue the idea of the band in that connection is stricken out, and the pressure is said to be made to keep the strip straight "on its way to the action of the ruffling blade." In

the original the elastic shank, *j*, is said to press the edge of the knife down on "the bottom part of the guide;" but in the reissue it is said to press it down on "the support or plate, *i*." In the original the knife is said to have a movement "upon the bottom, *i*, of the guide, *E*, towards and from the needle-hole." In the reissue the knife is said to have "a movement." In the original "the feed movement" is said to carry "both band and ruffle towards the needle." In the reissue "the feeding device" is said to carry forward "both the band, or plain part to which the ruffle is attached, and the ruffle." In the original it is stated that "the ruffle strip is delivered into the fold of the band and ruffled by the action of the knife, as hereinbefore described, and sewed into the band by the needle passing through both the upper and lower parts of the band, close to the edges thereof." In the reissue it is said that "the strip resting on the support, *i*, is ruffled, delivered to the unruffled material or the band, by the action of the knife, as hereinbefore described, and the ruffled and plain fabric are united by the stitching mechanism of the sewing-machine, the needle, when operating with the band, passing through both the upper and lower parts thereof, close to the edges of the band." In the original it is stated that "in the ruffling operation the knife, *F*, is prevented from acting on the under part of the band by the extension of the lower part, *i*, of the guide, *E*, beyond the upper part and below the knife; the said part of the band passing under the extended portion of *i*, and the ruffle strip passing over it for the knife to act upon, and the said extended portion protecting the lower part of the band from the action of the knife." In the reissue it is said that "in the ruffling operation the blade or knife is prevented from acting on the band or plain fabric beneath the ruffle by the support or plate, *i*." These studied efforts to convert the bottom of the guide, *E*, into something other than the bottom of a guide, and into a supporting or secondary plate, dis severed from a guide, and to introduce the feature of ruffling a strip of goods above a plain piece, in addition to ruffling it in connection with a band which has two parts, an upper part and an under part, and thus to pave the way for introducing claims 8 and 9 of the reissue, are supplemented by the introduction into the reissue of the following new matter:

"The ruffled strip may be stitched, as formed, on to a plain fabric introduced under the guide, *E*, and between the support or plate, *i*, and the feeder, *r*, the latter engaging and moving the plain fabric with the ruffle attached, while the ruffling knife or blade engages only the strip to be gathered, and carries it forward to the needle."

The internal evidence thus afforded by the patents is fortified by the external evidence. The plaintiff, George H. Wooster, became the owner, on June 1, 1875, of the entire interest in the original Pipo patent. The interest in the Robjohn invention was vested in Mrs. Emma C. Wooster, the wife of the plaintiff, before the original patent was issued, and it was issued to her. On the seventeenth of

June, 1875, she assigned her interest in it to the plaintiff. He applied for the reissue of the Pipo patent on June 22, 1875, and for the reissue of the Robjohn patent on July 19, 1875. In the Pipo case, the application was signed by both Pipo and the plaintiff, the new specification was signed by Pipo, and the oath to it was made by Pipo, June 21, 1875. In the Robjohn case, the application was signed by the plaintiff, as assignee of Robjohn, the new specification was signed by the plaintiff, as assignee of Robjohn, and the oath to it was made by the plaintiff, July 17, 1875. In that oath the plaintiff deposed, "that he verily believes that, by reason of an insufficient specification, the aforesaid letters patent granted to E. C. Wooster, as assignee of Thomas Robjohn, are inoperative; that the said error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, to the best of his knowledge and belief; that the entire title to said letters patent is vested in him; and that he verily believes the said Thomas Robjohn to be the first and original inventor of the invention set forth and claimed in the foregoing amended specification, and that the said Robjohn is now deceased." Although, as Robjohn was dead, the reissue may have been properly made, under section 4895 of the Revised Statutes, on an application made, and a corrected specification signed by the assignee, the reissue lacks the support which an oath by the inventor as to inadvertence, accident, or mistake might afford to it.

The circumstances under which the plaintiff applied for these reissues, after he thus became the owner of the two patents, and the object he had in view in doing so, are stated by himself. He was using the Pipo and Robjohn machines in the business of making ruffles. His attention was called to the Johnston ruffler and the Toof ruffler, as ruffling devices to be attached to sewing-machines; and he was applied to to sell the Robjohn patent, owned by his wife. He then examined the matter in connection with both patents, and concluded that they could be reissued with the claims now in them, so as to cover such ruffling attachments. He then purchased the Pipo patent, and took an assignment of the Robjohn patent, and applied for the reissues. The Johnston and the Toof rufflers were in the market. Patent No. 111,458, granted to Allen Johnston and William T. Johnston, January 31, 1871, for an "improvement in gathering attachments for sewing-machines," and patent No. 146,005, granted to Allen Johnston, December 30, 1873, for an "improvement in gathering and ruffling attachments for sewing-machines," describe and show the Johnston ruffler as it is sued herein. No. 111,458 shows the features in it which are alleged to infringe claims 1, 7, 8, and 10 of the Pipo reissue; and No. 146,005 shows the features in it which are alleged to infringe claims 8 and 9 of the Robjohn reissue.

The defendant's ruffling attachments are alleged to infringe claims 8 and 9 of the Robjohn reissue, because they have (1) a ruffling blade; (2) a secondary plate, separate from the cloth-plate of the sewing-

machine; (3) the cloth-plate, when in use, lying below the secondary plate, and the goods to be ruffled lying above the secondary plate, and between it and the blade, and a plain strip lying above the cloth-plate, and below the secondary plate, and between the two. The defendant's attachments do not have the combination claimed in claim 1 of the original Robjohn patent.

But it is contended for the plaintiff that claim 2 of the original Robjohn patent was capable of being construed in two ways. It read thus:

"(2d) In combination with the ruffling knife acting above the strip which is to form the ruffle, I claim the extension of a portion of the bottom, *i*, of the guide, E, or its equivalent, below the said knife, in such a position as to be interposed between the ruffle strip and the lower part of the band, substantially as and for the purpose herein specified."

It is said that the claim might have been construed as including in the combination only the part *i*, as being the part which really does the work of protecting the lower part of the band from the action of the ruffling knife; or it might have been construed as including not only the part, *i*, but the tube, E, with a covered top, from which the part, *i*, is extended, and which tube guides the piece to be ruffled. The argument is that claim 2 was, therefore, defective, because it was obscure or ambiguous, and uncertain in meaning, and insufficient in not clearly pointing out the invention desired to be covered; and that in neither claim 8 nor in claim 9 of the reissue is the tube or guide, E, an element.

Claim 2 of the original patent fully and clearly embodied the descriptive part of the original specification, which was in these words:

"In the ruffling operation the knife, F, is prevented from acting on the under part of the band, by the extension of the lower part, *i*, of the guide, E, beyond the upper part, and below the knife, the said part of the band passing under the extended portion of *i*, and the ruffle strip passing over it for the knife to act upon, and the said extended portion protecting the lower part of the band from the action of the knife."

So far as claim 2 of the original patent was concerned, the specification of that patent clearly and accurately described the invention which that claim sought to cover, and, so far as such description was concerned, there was no defect or insufficiency, and the patent was not invalid or inoperative to cover anything arising out of such description which was set forth as an invention. There is no evidence that that there was, in fact, any inadvertence, accident, or mistake.

Taking the language of claim 2 of the original patent, in connection with the descriptive part of the specification, the bottom, *i*, of the guide, E, is the lower part of a tubular guide which has an upper part, and it must be interposed between the ruffle strip and the lower part of such a double band as is described. No other band than a double band is anywhere mentioned in the original specification. It is a strip folded longitudinally by the guide, B, and having then an upper part and a lower part. It is folded along the center of its

width. The guide E is arranged in front of and partly within the guide B, and delivers the ruffle strip between the two edges of the double band. The two guides are rigidly attached together. One cannot be there to make the double band, without the other being present. The ruffled strip, between the upper and lower parts of the double band, is sewed to them, as the needle passes first through the upper part of the double band, then through the ruffled strip, and then through the lower part of the double band. It is the under part of this double band which is protected from the knife by the extension of the lower part, *i*, of the tubular guide, E, beyond the upper part of that guide, because such under part of the double band passes under the extended portion of *i*. There can be no double band without the guide B, and the guide E is rigidly attached to the guide B, and so the extended part of the lower part, *i*, of the guide E must be the extended part of the lower part of such a tubular guide as B is. There is no warrant, therefore, in the specification of the original patent, for extending the invention to cover the stitching of the ruffled strip on to a plain strip which is no part of a double band. The words "substantially as and for the purpose herein specified," in the original claim 2, refer to the purpose of protecting the lower part of a double band made by the guide B, by extending the lower part of the tubular guide E, which is rigidly attached to the guide B.

In view of the descriptive part of the original specification, claims 8 and 9 of the reissue could not have been sustained on that specification. There was no obscurity or ambiguity in the original claim 2. It was warranted by the description. That description authorized no claim as to the extension of a portion of *i*, different from what was claimed, as here interpreted, and the only admissible amendment of the claim, by the description as it stands, would have been one to interpret it in the same sense.

These considerations bring the case, as to the Robjohn reissue, within the decisions of the supreme court on the subject of reissues. *Gill v. Wells*, 22 Wall. 1; *Wood Paper Patent*, 23 Wall. 568; *Powder Co. v. Powder Works*, 98 U. S. 126; *Ball v. Langles*, 102 U. S. 128; *Miller v. Brass Co.* 104 U. S. 350; *James v. Campbell*, Id. 356; *Heald v. Rice*, Id. 737; *Johnson v. Railroad Co.* 105 U. S. 539; *Bantz v. Frantz*, Id. 160; *Wing v. Anthony*, 106 U. S. 142; S. C. 1 Sup. Ct. Rep. 93; *Hoffheins v. Russell*, 107 U. S. 132; S. C. 1 Sup. Ct. Rep. 570; *Gage v. Herring*, 107 U. S. 640; S. C. 2 Sup. Ct. Rep. 819; *Clements v. Odorless Excavating Apparatus Co.* 109 U. S. 641; S. C. 3 Sup. Ct. Rep. 525; *McMurray v. Mallory*, 111 U. S. 97; S. C. 4 Sup. Ct. Rep. 375; *Turner & Seymour Manuf'g Co. v. Dover Stamping Co.* 111 U. S. 319; S. C. 4 Sup. Ct. Rep. 401.

The bill must be dismissed, as to both reissues, because of their invalidity as respects claims 1, 7, 8, and 10 of the Pipo reissue, and claims 8 and 9 of the Robjohn reissue.

The application to introduce further evidence is granted as respects

the two affidavits of the plaintiff, and the files and contents in the matter of the reissues, but is denied in the other particulars.

No reason is seen why the defendant should not recover the costs of the cause.

The same rulings are made as to the case against Thornton and others.

In the case against Blake and others, the application to introduce further evidence is granted in the respects above indicated, and denied in the other particulars, and the suit as to them will proceed in course.

WOOSTER v. HOWE MACHINE CO.

Circuit Court, S. D. New York. July 22, 1884.

PATENTS FOR INVENTIONS.

Wooster v. Handy, ante, 51, followed. Bill dismissed.

In Equity.

BLATCHFORD, Justice. The decision herewith made, in *Wooster v. Handy, ante, 51*, requires that the bill in this case should be dismissed as to both of the reissued patents sued on, because of their invalidity as respects claims 1, 7, 8, and 10 of the Pipo reissue, and claims 8 and 9 of the Robjohn reissue; the dismissal to be with costs.

The same decision is made in the suits against the following defendants: The Singer Manufacturing Company, a New York corporation; the Wilcox & Gibbs Sewing-machine Company; the Domestic Sewing-machine Company, impleaded, etc.; Allen Schenck, impleaded, etc.; the Singer Manufacturing Company, a New Jersey corporation; and Charles B. Barker.

HOOD and others v. BOSTON CAR-SPRING CO. and others.

(Circuit Court, D. Massachusetts. July 25, 1884.)

PATENT—EARLIER PUBLICATION—DEFINITENESS.

A patent is not invalidated by statements in an earlier publication, unless these statements are full and definite enough to inform those skilled in the art how to put into practice the invention now patented.

In Equity.

Dickerson & Dickerson, for complainants.

Eugene N. Eliot, for defendants.

Before GRAY and NELSON, JJ.

GRAY, Justice. This is a bill in equity for the infringement of a patent granted to Isaac Adams, Jr., on May 6, 1879, for an improvement in coating metallic articles with vulcanizable rubber. The specification begins as follows:

"Great difficulty has been experienced in making rubber adhere securely to metals; but by my improvement a firm adhesion may be obtained. The invention consists in interposing between the metallic article and the rubber a film of any metal which, at the temperature of vulcanization, has a considerable tendency to unite with the sulphur always contained in the rubber compounds. Of metals possessing such tendency, the films of which may be interposed, the most suitable are copper and silver, and of these copper is the easiest as well as the cheapest to apply. Lead and zinc may likewise be used; but there is a greater difficulty in obtaining a suitable deposit of these metals for the interposing film. The metallic article is first covered with the film selected, and the rubber compound is then applied in the usual way and vulcanized."

The specification throughout insists upon the necessity of making the interposed film very thin. It states that the film must not be of the same metal as the article on which it is deposited; that it may be produced either by dipping or by electro-plating; that in covering iron, steel, or tin articles with copper, the method of dipping is preferable, and the article must be immersed in a weak solution of sulphate of copper just long enough to produce a bright copper-colored deposit; and that when the method of electro-plating is adopted, great care should be taken that too thick a film be not deposited, and a film such as is known as "coloring" or "striking" is sufficient.

The principal claim is for "the process of covering metallic articles with rubber, by first coating the said metallic articles with a thin film of copper or other metal which readily unites with sulphur, and then applying the rubber and submitting it to vulcanization, substantially as described."

According to the evidence, the peculiar value of this invention consists in the very thin film of copper, or other suitable metal, which, in the process of vulcanizing, is acted on by the sulphur contained in the rubber, so as to unite or combine with the sulphur and be absorbed into the rubber, and to hold together the rubber and the metal which has been coated with the film, and make the rubber stick so fast to that metal that it cannot be forced off without tearing the rubber itself. If the film of copper is too thick, the whole of it is not absorbed into the rubber, and so much of it, modified by the action of the sulphur, as is not absorbed, has so little coherence that the rubber may be readily detached. The difference is analogous to that which appears in the case of a glue, in itself friable and of little tenacity, a very thin film of which will hold two articles together, but a thicker layer of which may be easily broken apart. The value of the invention is well exemplified in the construction of wringer rolls, for which it has been much used by both parties.

The defendants admit that if the Adams patent is valid they have

infringed it. They contend that Adams was not the first inventor, but was anticipated by Louis Sterne, three patents to whom were introduced in evidence. Sterne's first patent is one granted in England, in 1866, for "improvements in buffers, draw-springs, and bearing springs," the specification of which describes the invention as consisting in introducing, between disks of hard India rubber or ebonite, alternate rings of soft India rubber, and uniting the rings to the disks during the process of vulcanization or otherwise; and states that "instead of the disks being made of hard India rubber or ebonite they may be made of brass, iron coated with brass, by means of the galvanic process or by other means, or they may be made of any other suitable metal or hard material." Of the two other patents of Sterne, the one for pneumatic springs made of alternate metal plates and rubber rings, forming an air chamber, was patented in the United States on February 23, 1869; the other, for driving-belts made of parallel strips of metal and of rubber, was patented in England on June 2, 1868, and in the United States on August 3, 1869. According to the description in either specification the rubber is chemically united with the metal during the process of vulcanization, and the metal plates or strips are first ground or scoured until their surfaces are perfectly free from scale or oxidized matter, and then "placed in a bath prepared to deposit the necessary precipitation of copper and zinc by the electro-metallurgical process." Each of Sterne's three patents speaks only of brass, a compound of copper and zinc, as the metal to be deposited; and the complainants contend that even a very thin film of brass would, by reason of securing a less perfect adherence, differ from the invention of Adams, in which the film is of a single metal. But it is unnecessary to consider that point, because it is quite clear that neither of the Sterne patents contemplates or points out the necessity of making the film very thin, or gives any directions by which a person of competent skill would be led to make the film so thin as to produce the result described in and obtained by the patent of Adams. A patent is not invalidated by statements in an earlier publication, unless those statements are full and definite enough to inform those skilled in the art how to put in practice the invention now patented. *Betts v. Menzies*, 10 H. L. Cas. 117; *Neilson v. Betts*, L. R. 5 H. L. 1; *Seymour v. Osborne*, 11 Wall. 516, 555; *Cawood Patent*, 94 U. S. 695, 703, 704; *United Nickel Co. v. Anthes*, Holmes, 155; *Same v. Manchester Brass Co.* 16 Blatchf. 68.

Decree for the complainants.

FOSTER v. GOLDSCHMIDT and others.

Circuit Court, S. D. New York. July 17, 1884.)

1. **PATENT—LICENSE—BREACH OF CONDITION—COMPLAINANT AT FAULT—EQUITY.**
In an action growing out of the alleged failure of the defendant to act up to the terms of a license, granted him by the complainant, to sell a protected article, if the complainant refuses to fulfill any of his obligations in matters of substance, under the license, a court of equity will not interfere to assist him in compelling the defendant to observe the obligations upon his part.
2. **SAME—CONDITION TO PROSECUTE INFRINGERS—HOW IT IS EXECUTED.**
One of the conditions of a license being that the complainant should prosecute all unlicensed persons who should sell imitations of the article licensed, if the action of the complainant was such that it resulted, practically, in stopping infringements, he fulfilled the spirit and meaning of his obligation to the defendant to use reasonable diligence in prosecuting unlicensed sellers.
3. **SAME—OLD AND NEW LICENSE—ELECTION—ESTOPPEL.**
A condition in a license being that if any license should be thereafter granted under the patent, the terms and conditions of which should be more liberal to the licensee than those "herein contained," the defendants were to be entitled to receive the benefits of the additional advantages; if, upon such a case arising, the complainant gave the defendants the option of deciding whether they should have a new license or keep the old one, and the defendants elected to refuse the new license, they cannot be heard afterwards to allege that its terms were more advantageous to them. They cannot, instead of accepting the new license, *cum onere*, insist on determining what part they will accept and what part reject.
4. **SAME—PROMISE IN THE ALTERNATIVE.**
A promise in the alternative puts the alternative in the election of the promisor, unless there is something to take it out of the general rule.
5. **SAME—AMBIGUOUS DOCUMENT—RULE OF CONSTRUCTION.**
When both parties have acted upon a certain construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the court.

In Equity.

Livingstone Gifford, for complainant.

Marsh, Wilson & Wallis, for defendants.

WALLACE, J. This case has been heard upon the pleadings, which set out copiously matters of evidence in support of the allegations. The bill of complaint is filed to restrain the defendants from selling gloves bearing lacing studs and lacings, which have not been applied to the gloves by the complainant, in violation of an agreement made between defendants and the complainant, June 6, 1876, whereby the complainant licensed the defendants to use certain patented hooks and lacings for gloves when applied to the gloves by complainant.

The conditions of the license agreement, so far as they are material to the present suit, are as follows: The complainant, in consideration of the payment of certain royalties by defendants, allows the defendants to sell gloves containing the patented invention, provided the gloves have had their lacing studs or hooks and lacings applied by the complainant. Article 3 of the agreement provides that whenever defendants desire to have gloves finished by the application of lacing studs or hooks and lacings, at least 60 days before the work of

finishing is to be commenced, they are to notify the complainant, stating when they will commence to furnish the gloves to be finished, and the number they will furnish each week. Article 4 provides that after the beginning of the time mentioned in the notice the defendants are to furnish the gloves to be finished to the complainant according to the terms of the notice; "which gloves shall be ready to be finished by the application of lacing studs or hooks and lacings." Article 5 provides that all gloves thus furnished to complainant he shall cause to be finished by the application of lacing studs or hooks and lacings, using the same material and care as he may use in finishing his own best quality of gloves, and shall return said gloves to the defendants within two weeks after he receives them. Article 12 provides that the complainant shall use reasonable diligence in prosecuting or causing the prosecution of unlicensed persons who shall sell imitations of the gloves hereby licensed. Article 17 provides that if any license shall be thereafter granted under said patent, the terms and conditions of which are more liberal towards the licensee than those herein contained, the defendants are to be entitled to receive the benefits of the additional advantages.

The defendants admit that since August 7, 1883, they have been selling gloves with the lacing studs and lacings which have not been applied by complainant, but they insist upon their right to do so, upon the theory that the complainant has violated some of the conditions on his part contained in the agreement. Concededly, if the complainant has refused to fulfill any of his obligations in matters of substance under the license, a court of equity will not interfere to assist him in compelling the defendants to observe the obligations upon their part. They allege that he has not used reasonable diligence in the prosecution of infringers under article 12 of the agreement, "in that prior to November, 1881, many persons were systematically selling large quantities of said laced gloves without any license in the city of New York;" that prior to that time they had notified him that numerous houses in the city of New York were then selling,—among them, A. T. Stewart & Co., Haines Bros., Wilmerding & Co., Egglebrecht & Bernhart, and others,—and requested him to take steps to prevent such sales; and that he neglected and refused to prosecute such parties, or any of them.

The bill of complaint alleges the commencement of seven suits against parties selling such gloves in the city of New York between October, 1881, and May, 1882, and sets out the proceedings and their result sufficiently to show that the complainant exercised reasonable diligence and good faith. The answer admits that five of these suits were commenced, and that injunctions were obtained in four of them. Without attempting to particularize the allegations of the bill and answer in reference to this branch of the controversy, it will suffice to state that although it must be conceded that the complainant failed to prosecute several infringers whose conduct was complained of by

the defendants, it nowhere appears that any of the parties continued to infringe after the complainant had brought suits against other infringers in the same city. There is a general averment in the answer that during the whole time of the continuance of the license complainant refused to prosecute sellers whose sales were injuring the defendants; but this allegation refers to sales made by licensed parties, and by the terms of the agreement complainant only undertook to prosecute infringers. If the action of the complainant was such that it resulted practically in stopping infringement, he fulfilled the spirit and the meaning of his obligation to the defendant to use reasonable diligence in prosecuting unlicensed sellers.

There are two controlling facts bearing upon this question which stand admitted: *First*, that all the infringements of which defendants complained, and now complain, took place prior to November, 1881; and, *second*, that after the suits were brought by complainant the defendants continued to recognize the agreement as binding until June, 1883, when they placed their right to repudiate it upon another ground.

The reasonable deduction from all the facts, as they appear upon the pleadings, is that the complainant used reasonable efforts to stop infringements; that within a few months these efforts were successful; and that his conduct was acceptable to the defendants until other causes of disagreement arose.

The defendants contend that the complainant has refused to allow them the benefit of additional advantages granted to other licensees subsequent to the license to defendant. It was upon this ground that they insisted the complainant should finish their gloves with the new appliances invented by him subsequent to the date of their license, and upon his refusal to do so that they undertook to finish their gloves themselves, and to use the new appliances therefor.

The pleadings show that after the license to the defendants was granted, the complainant devised and patented improvements upon the old appliances; that in May, 1883, he transferred to Foster, Paul & Co. his business and his patents, reserving, however, such an interest therein as would enable him to carry out his agreements with his existing licensees; that thereupon he notified the defendants that they could elect to have their gloves finished by him under the existing agreement as theretofore, or they might surrender their license and receive from Foster, Paul & Co. a new license, under which that firm would finish the gloves with the new appliances; that accompanying said notice the complainant sent defendants the form of the new license to be issued by Foster, Paul & Co.; that this license provided that the licensee should be entitled to have the new appliances used in finishing their gloves, and also contained conditions in some respects more favorable, and in others less favorable, to licensees than those of the old license. The defendants refused to accept the new license, insisted that complainant should finish their gloves with the

new appliances, and notified him that if he refused to do so they should supply themselves with the new fastenings and finish their own gloves therewith; and thereupon, complainant having refused to comply with their demands, they adopted the course they had indicated they should adopt. The position of the defendants, therefore, is this: they insist that they are entitled to be furnished with the new appliances by the complainant on the same terms of the old license; and, while they demand the benefit of the more favorable terms of the new license, they refuse to accept those which are more onerous. The error of this theory originates in a radical misconception of the meaning of the agreement. They are entitled to the additional advantages offered by a new license only when the terms and conditions of the new license are more liberal for the licensee than those of the old license. The obvious purpose of the condition was to put the defendants on an equality with any future licensees. If taken in all its parts, the new license is not more favorable to the licensee than the old; the occasion does not arise upon which the condition becomes operative.

It cannot be determined as a matter of law or as a question of fact that the new licenses offered by the complainant in the name of Foster, Paul & Co. were more liberal in their terms towards licensees than were the old ones. The defendants evidently considered that they were not, because they refused to accept the new license. The complainant gave the defendants the option of deciding whether they preferred the new license to the old one; and after the defendants elected to refuse the new one they cannot be heard to allege that its terms were more advantageous to them. Instead of accepting its benefits *cum onere*, they insisted on determining for themselves what parts they would accept and what they would reject. If this were permissible, instead of being placed upon an equality with the new licensees, they would enjoy superior privileges to them. Such a result was never contemplated by the agreement, and is opposed to any legitimate interpretation of its terms.

The defendants also contend that by the terms of their license agreement with complainant they were entitled to have their gloves finished with lacing studs or lacing hooks, at their option, and that the complainant has refused to finish their gloves with studs. The fallacy of their position consists in construing an option belonging to the complainant as one belonging to them. Article 5 of the agreement is the covenant on the part of the complainant in reference to finishing the gloves for the defendants, and obligates him to "cause them to be finished by the application of lacing studs or hooks and lacings." If there were nothing else than the language of this condition to resort to for construction, it would seem clear that the promise of the complainant would be performed by applying either lacing studs or hooks. The promise is in the alternative and the election with the promisor. The ancient case cited in *McNitt v. Clark*, 7 Johns. 465, where the obligor promised to pay £20 or 20 bales of wool, estab-

lished the rule. As stated by REDFIELD, C. J., in *Mayer v. Dwinell*, 29 Vt. 298, "a promise in the alternative puts the alternative in the election of the promisor, unless there is something to take it out of the general rule." There are other provisions of the agreement which enforce this interpretation of the condition, and indicate that the complainant was to determine whether lacing studs or hooks should be applied. Such are the provisions which require defendants to give notice in advance to the complainant of various details relating to the finishing of the gloves, but are silent as to the kind of fastenings to be applied. But perhaps the most satisfactory reason for construing the condition as indicated is the construction the parties have placed upon it themselves by their conduct until this controversy arose. When both parties have acted upon a certain construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the court. Pollock, Cont. 392.

These considerations dispose of all the important questions in the case. There is no reason to suppose that the defendants have desired to disregard the complainant's rights, but they have acted on a false construction of the agreement.

A decree for an injunction and an accounting is ordered for complainant.

AMERICAN DIAMOND DRILL CO. v. SULLIVAN MACHINE CO.

(Circuit Court, S. D. New York. July 21, 1884.)

PATENT LAW—LESCHOT PATENT STONE-DRILLS—ANNULAR STOCK—CONVEX BORING BAR.

The intent of the patentee having been to apply for and obtain a patent for an annular stock, and not for a tool that did not leave a core, and the specification and the claim having been framed so as to describe the annular tool and no other, there was in the original patent, according to modern decisions, no error which had arisen through inadvertence, accident, or mistake, nor was there any defectiveness or insufficiency in the specification.

In Equity.

Edmund Wetmore, for plaintiff.

E. T. Rice and Alvan P. Hyde, for defendant.

SHIPMAN, J. In 1875 this court passed an interlocutory decree enjoining the defendant against the further infringement of the second claim of reissued letters patent No. 3,690, to Asahel J. Severance, as assignee of Rudolph Leschot, dated October 26, 1869, for an improved rock-drill. The original patent was issued to Leschot, and was dated July 14, 1863. The interlocutory decree was subsequently modified so as to enjoin against the infringement of the third claim of the re-issue. An accounting has been had before a master, whose report now comes for confirmation, and the case is ready for a final decree.

Exceptions have been taken on both sides to the report, but all the exceptions are overruled, and the report is confirmed as containing a correct finding upon the questions which were referred to the master.

The important question is, whether, under the recent decisions of the supreme court, the second and third claims of the reissue are valid, and whether the final decree should not be for a dismissal of the bill. *Perkins v. Fourniquet*, 16 How. 82.

The invention, the second and existing reissue, and the infringing device were described in the opinion in the case of *American Diamond Rock Boring Co. v. Sullivan Machine Co.* 14 Blatchf. C. C. 119. The descriptive part of the original patent was substantially the same as the corresponding portion of the present reissue. The single claim of the original was as follows:

"The tool for boring or cutting rock, or other hard substances, composed of an annular or tubular stock or crown, armed with a series of diamonds, and operating substantially as herein specified."

The defendant's device had, instead of an annular boring head, a convex boring head armed with diamonds, and with two holes on its surface for the passage of water. By this device the entire portion of rock which is acted upon by the tool is abraded.

The second and third claims of the present reissue are as follows:

"(2) The row of cutting edges, a^1 , when attached to a revolving boring head, so as to project beyond the circumference thereof, for the purposes specified.

"(3) In combination with a revolving and progressing boring head, having cutting points projecting beyond the periphery thereof, a hollow central drill-rod, through which the water is forced or passed."

The plaintiff insists that Leschot's actual invention was a revolving and progressing boring head armed with cutting points projecting beyond its periphery, so that they will cut a hole of larger diameter than that of the boring head and drill, and give a clearance, and a hollow drill-rod adapted by reason of its tubular form to permit the injection of water through the orifice in the boring head to wash away the *detritus*; and further, that Leschot described in the original patent the manner in which the diamonds were placed, so that a larger diameter was given to the hole than that of the boring head. Both these positions are true. The plaintiff then says that the original claim did not limit the patent to an annular boring head, but expressly included a tubular one, so that a convex head was included in the patent as originally granted, and therefore that the new claims of the reissue are not an expansion of the original. The plaintiff understands the words "annular or tubular" to mean that "the head may be annular, so as to have a core, or tubular, so as to permit the passage of water; and that in any case the head must be tubular, in the sense of a passage through it for the flow of water."

If the claim of the original patent did limit the invention as patented to an annular crown which would necessarily bore an annular

hole, having a central core, the plaintiff admits that the second and third claims of the reissue are an enlargement of the original patent, and, being contained in a reissue which was granted six years after the date of the original patent, are void.

The sole idea of Leschot when he obtained his original patent was that he had a tool which bored an annular groove, leaving a central core or kernel. He did not see that his invention was broader than his statement of it, and could be made very useful for channeling or cutting from the quarry blocks of marble or rock by making a series of holes which did not leave a core. But he presented his invention to the patent-office as one which had the single office, so far as its cutting character was concerned, of boring annular holes or grooves, and which was so constructed as to leave a central core within the hole or groove. He said, indeed, that the operation of his tool would be assisted by the injection of a stream of water through the tubular bar, for the purpose of washing out the *detritus*, but this sentence or paragraph makes it plain that he considered that the chief function of the tubular crown was to make an annular hole which should have a core. The stock must be annular, and, being annular, it could admit a stream of water through the hollow bar. The claim of the original patent was not intended to enlarge the descriptive part of the specification, but to describe compactly and tersely the very invention which he had previously described more at length, and the words "annular or tubular" in the claim are synonymous, and were intended to convey the same idea which the patentee had expressed in the descriptive part of the specification. Therefore, if the patent was to include a convex boring bar, and so include the actual invention, it must be reissued. But the intent of the patentee having been to apply and obtain a patent for an annular stock, and not for a tool which did not leave a core, and the specification and the claim having been framed so as to clearly, accurately, and precisely describe the annular tool and no other, there was in the original patent, according to the modern decisions, no error which had arisen through inadvertence, accident, or mistake, nor was there any defectiveness or insufficiency in the specification.

The interlocutory decree was right, according to the theories of the law which were generally accepted in 1875. It is wrong as the law now stands.

The decree dismissing the bill for the reason herein set forth will be settled, if desired, upon hearing.

HART and others v. LEACH and others.

(District Court, D. Maryland. July 5, 1884.)

SHIPPING—CHARTER-PARTY—BILL OF LADING—EMBEZZLEMENT BY MASTER—FRUIT CARGO—GOLD COIN—USAGE OF TRADE.

A vessel was specially chartered for a lump sum to make a voyage from Baltimore to the Bahama islands, the charterers to furnish "ballast out and a cargo of fruit back." A sum in gold coin was given by charterers to the master, for which he gave a bill of lading, "freight as per charter-party." On the voyage out the master left the ship, having embezzled the money. *Held*, that under the charter-party the owners did not contract for the safe carriage of gold coin, and that the bill of lading was given without authority. *Held, further*, that the alleged usage in the fruit trade with the Bahamas to send out in the vessel gold coin with which to purchase the return cargo was not proved to be such a usage as would bind a specially chartered vessel as carrier of the gold, and that in this case the master received the gold as bailee of the charterers.

In Admiralty.

Barton & Wilmer, for libelants.

John H. Handy, for respondents.

MORRIS, J. The libelants are importers of fruit in the city of Baltimore, and chartered from the respondents the schooner B. A. Wagner, of about 50 tons, for a voyage to the Bahama islands and back. The schooner had just made several such trips in the same employment under a charter between the same parties. The present charter was dated June 14, 1883, and by it the respondents (the owners) chartered the vessel to the libelants for a voyage from Baltimore to one or more ports in the Bahama islands, and back to Baltimore, "the vessel to be tight, etc., and receive on board the merchandise hereinafter mentioned," and the charterers engaged to provide and furnish to the vessel "ballast outward, and a cargo of fruit back to Baltimore," and agreed to pay a lump sum of \$500 for the round voyage on a proper delivery of cargo at Baltimore. The agent of the owners, (who was also part owner of the schooner,) as well as the charterers, lived in Baltimore. When the vessel was first chartered, on April 12, 1883, there was some discussion between them about the appointment of a proper master familiar with the fruit trade and the ports to be visited, and upon the recommendation of the charterers the owners appointed a certain McCahan to be master. He was a mariner of experience in this particular fruit trade with the Bahamas, and a man of good reputation, and frequently employed by the charterers. He made the earlier voyages of the season satisfactorily, but on the voyage in question the charterers intrusted to him in Baltimore a bag containing \$1,200 in gold coin, to be delivered to their agent at the Island of Eluthera, to purchase pine-apples for the return cargo, and when the vessel had proceeded down the bay as far as Fortress Monroe he went ashore, taking the gold, and has not been heard of since. When the gold coin was given to the master, he executed a bill of lading in usual form, undertaking to deliver the

gold to "J. W. Culmer, Tarpan Bay, Eluthera; freight as per charter-party."

This is a libel against the owners of the schooner to hold them for the non-delivery of the gold. The respondents deny their liability, alleging that the bill of lading was given without their knowledge or authority, and that the only contract binding upon them is the charter-party, and that by its terms they did not undertake the carriage of gold coin. The libelants, however, contend that the charter-party is the usual one by which vessels are hired for the pine-apple fruit trade between Baltimore and other ports of the United States and the Bahama islands, and that it is well known that it is impossible to use drafts or letters of credit in those islands, and that there is a general usage in that trade by which, under such a charter, unless the vessel takes out merchandise for that purpose, she takes out gold coin with which to purchase the cargo of pine-apples which she is to bring back, and that under this usage the hire agreed to be paid for the vessel for the round trip includes the transportation of gold, if gold is sent out.

It must be conceded, I think, that, as this was not a general, but a specially chartered vessel, the giving of the bill of lading does not alter the rights of the parties to this cause. The bill of lading is an acknowledgment of what is otherwise fully proved in this case, viz., that the gold was delivered to the master, and was taken on board by him; but, as between owner and charterer, it does not vary the contract created by the charter-party. If, therefore, by the terms of the charter-party itself, or by its terms, as explained by any proved and admissible usage, the charterers had the right to send out the gold at the risk of the vessel, then the owners are liable, but not because the master gave the bill of lading contracting for its safe carriage. The master has authority to do all things necessary for the performance of the charter-party, but he cannot vary the contract which the owner has made. *Gracie v. Palmer*, 8 Wheat. 639; Abb. (12th Ed.) 89; 1 Pars. Shipp. & Adm. 286. A fair test of the authority of the master to contract for the transportation of the gold under the charter-party is to consider whether, if the owners had refused to give such a bill of lading, the libelants would have had an action for the breach of the charter-party. The language of the charter-party is that the vessel shall receive on board the merchandise hereinafter mentioned, "ballast outward, and a cargo of fruit back to Baltimore." It is said that, by the usage of this trade, under such a charter, merchandise is constantly sent out instead of ballast. Such may be the usage and the understanding, for the merchandise furnishes the weight to stiffen the ship, and is, in one sense, ballast, at the same time that it is cargo, and the stipulation that the charterer shall furnish ballast is inserted for the protection of the owners. But how can the language be extended so as to apply to a bag of gold coin, which is neither merchandise nor ballast, any more than bank-notes would be? It seems to

me, therefore, unless the charter is controlled by usage, the sufficient answer of the owners to such an action would be that they had not refused anything which, by the charter-party, they were required to do.

Let us consider, then, what is proved in respect to the alleged usage. It is shown to be a fact well known to all the parties to this charter-party that the cargo for which this vessel was to go out could only be purchased with money or merchandise, and that vessels in that trade must take out either one or the other. But when money is sent I do not think it is shown that there is any settled course of business. The regular importation of pine-apples from these islands is confined to the libelants and one other firm in the city of Baltimore. It is shown that the vessels are uniformly chartered at a lump sum for a round trip, but it appears that sometimes the charterer sends a supercargo. Sometimes, in addition to the master, a man of special experience is sent, who acts as navigator, and is paid by the owner, but who also acts as supercargo for the charterer. In these cases the person who is supercargo is intrusted with the money. As a rule, when there has been no navigator or supercargo, and the money has been intrusted to the master, no bill of lading has been taken, but a simple receipt from him. In the two voyages made by this same master in this vessel for the same parties in April and May, just preceding the present voyage, no bill of lading was taken. It would seem that taking a bill of lading was the exceptional and not the usual course. It appears that, for this trade, if there is no supercargo, there is required a master, who, from experience, understands the care of a cargo of fruit, and is something of a judge of it, and is able to see to the charterer's interest in dealing with the agents who are to procure the cargoes. He is therefore either selected upon the recommendation of the charterers, or is a man already favorably known to them, and when the vessel is about to sail, if money is sent it is handed to him, together with his letters of instructions. The vessels hired for this trade are not regularly engaged in it, but are usually vessels whose regular employment is to carry oysters on the Chesapeake during the colder months, and which make an occasional voyage for fruit when, during the spring and summer months, they cannot pursue their regular business.

It does not appear to me to be established by the proof that there is a usage for money to be taken out by the master at the risk of the ship, or that a bill of lading is usually given for it, or that it has been understood that the vessel undertook with regard to it the obligations of a carrier. The carriage of money cannot by any construction of the charter-party be found within its terms. It is an employment well known to be attended with exceptional risks of every sort, for which carriers are usually specially compensated. It would seem in the highest degree improbable that vessel-owners would make no difference in the rate of compensation for assuming responsibility for stone-ballast, and the great risk of the safe carriage and delivery of

sufficient gold to purchase a cargo. If such an interpretation of the charter is sought to be made out by usage, there is every reason that the usage should be required to be certain, uniform, and established.

There are authoritative cases which hold that where, by settled course of business and custom, a carrier who undertakes the carriage of goods for sale, is, without any additional compensation, to bring back the proceeds of the goods and pay the money over to the shipper, that the vessel and owners are bound for the master's default if he does not pay over the money; it being held that under the usage the whole business was one employment, all compensated for by the freight. *Kemp v. Coughtry*, 11 Johns. 107; *Emery v. Hersey*, 4 Greenl. 407. But these were cases of common carriers, and not of vessels specially chartered for a lump sum. The amount of money to be returned was dependent on the amount of merchandise for which freight was paid, and therefore bore a direct relation to the compensation received. In cases similar to the present one this element of certainty is wanting. The money sent out is a mere estimate of the cost of the return cargo. In the voyage just before the present one these charterers sent out by this same master \$2,500 in gold, besides merchandise, together sufficient in value to pay for two cargoes,—one to be sent home by a vessel they expected to obtain in the Bahamas.

After a careful consideration of this case, I have not been able to find any usage proved which can control the charter-party, and am of opinion that in taking the gold the master acted as bailee for the charterers, and not in his own capacity as master. If, in a similar case, it is intended that gold shall be carried under the contract of affreightment, nothing is easier than to so word the charter-party.

Libel dismissed.

GUDGER v. WESTERN N. C. R. Co. and others.

(Circuit Court, W. D. North Carolina. Spring Term, 1884.)

1. PLEADING AND PRACTICE—COMMON-LAW FORMS OF ACTION—NORTH CAROLINA.

Although the old forms of actions at common law have been abolished by the constitution and statutes of North Carolina, and a civil action substituted as a remedy, in all cases at law and in equity the old distinctions must be kept in view in giving redress.

2. SAME—ACTION AGAINST CORPORATION—EQUITABLE RIGHTS OF PRIVATE PERSONS IN CORPORATE PROPERTY.

The *gravamen* of the action being a tort alleged to have been committed by the defendant corporation alone, the action is properly brought, and can be maintained against the corporation without the joinder of private individuals who claim to be the equitable owners of the property held and employed by the corporation. Such individuals might be made liable by way of adoption and ratification of the wrong done by their agents, but they are not necessary parties to this action.

3. REMOVAL OF CAUSE—NON-RESIDENT DEFENDANT BY CONSENT.

Whether, after action brought in a state court, (the necessary parties being residents of the same state,) a non-resident—admitted by consent as a defendant—can have a removal to a federal court, *quære*.

4. SAME—DISTINCT CAUSE OF ACTION.

To entitle a party to a removal, under section 2 of the act of March 3, 1875, c. 137, there must exist a distinct cause of action in the suit, in respect to which all the necessary parties on one side are citizens of different states from those on the other.

5. SAME—SEPARATE CONTROVERSY ACT OF MARCH 3, 1875, CH. 137.

The word "controversy" is employed in the statute, March 3, 1875, c. 137, and a "separate controversy" is not identical in signification with a "separable cause of action." There may be separate remedies against several parties for the same cause of action, but there is only one subject-matter involved. Separate controversies, within the meaning of the statute, are separate causes of action, either of which might be sued on alone.

6. SAME—REMEDIES—SEPARATE DEFENDANTS.

When a person has been injured by the tortious acts of several parties, he has for the injuries sustained one cause of action against all; but he may seek his remedy by suing any or all the wrong-doers. If, in an action against *one*, he has judgment, he cannot afterwards prosecute a joint action, because the prior judgment is, in contemplation of law, an election on his part to pursue his several remedy.

7. SAME—ACTION AT LAW—EQUITABLE RIGHT—MATERIALITY.

To constitute a controversy in an action at law there must be allegations on one side and denials on the other, making an issue either in fact or in law. An equitable right claimed by an individual in the property of the corporation sued is not material when that property is not the subject-matter in controversy at law.

8. SAME—PRACTICE IN NORTH CAROLINA—CIVIL ACTIONS—LAW AND EQUITY—PRACTICE IN UNITED STATES COURTS.

According to the liberal mode of proceeding in civil actions in North Carolina parties may assert equitable rights and have them enforced in the same action; but this is not allowable in the federal courts, where legal and equitable causes of action and defense cannot be blended.

9. SAME—ELECTION BY PLAINTIFF AS TO DEFENDANT—SUBSEQUENT DEFENDANTS.

Election of remedy is a right which the law gives a plaintiff in action of tort, and this right cannot properly be embarrassed by subsequently made defendants raising new and independent issues in the pleadings.

Motion to Remand Case Removed from the State Court.

J. M. Gudger and J. H. Merrimon, for plaintiff.

Henry & Cummings, M. E. Carter, and D. Schenck, for defendants.

DICK, J. In the complaint filed in the state court the plaintiff alleges that the Western North Carolina Railroad Company is a corporation duly constituted and organized under the laws of this state, and by virtue of such laws was authorized and empowered to survey, locate, extend, build, and complete a railroad through the counties of Buncombe and Madison to the Tennessee line, near or at Paint Rock; that in the exercise of such powers and in surveying the track of said railroad through the main street in the town of Marshall, in Madison county, (without the consent of said town,) it wrongfully, carelessly, and negligently placed and fixed firmly in the ground in said street a wooden stake, against which the plaintiff accidentally struck his foot, whereby he was thrown to the ground and the bone of his right thigh was broken; and by reason of said injury he has been damaged \$10,000, and he is entitled to recover said sum from the railroad company defendant.

The substance of the complaint thus briefly stated shows that the civil action brought originally against the defendant corporation is in the nature of an action of *trespass on the case* at common law. Although the old forms of action at common law have been abolished by the constitution and statutes of this state, and a civil action substituted as a remedy in all cases at law and in equity, the old distinctions must always be kept in view in giving redress. As the *gravamen* of this action is a *tort* alleged to have been committed by the defendant corporation alone, the action was properly brought and could have been maintained against the corporation without the joinder of A. S. Buford, T. M. Logan, and W. P. Clyde, the other defendants, who claim to be the equitable owners of the property held and employed by the corporation. It may be that, as the act complained of was done in the interests of the owners of the property, and for their use and benefit in carrying out their purposes in constructing the railroad, they might be made liable by way of adoption and ratification of the wrong done by their agents; but they are not necessary parties to this action.

The record of the case shows no order of the state court allowing or directing the individual defendants to be made parties, but it is conceded by the counsel of plaintiffs that, by consent, they were allowed to become parties, and they filed an answer setting up their equitable rights of property at a term of the court subsequent to the commencement of the action. When admitted as parties the individual defendants filed a petition to remove the case in this court under the second clause of the second section of the act of March 3, 1875.

In *Gibson v. Bruce*, 108 U. S. 561, S. C. 2 Sup. Ct. Rep. 873, the supreme court decided that "a suit cannot be removed from a state court, under the act of 1875, unless the requisite citizenship of the

parties exists, both when the suit was begun and when the petition of removal was filed."

It is insisted by the counsel of defendants that this rule cannot apply to a case like the one before us, where persons who were non-resident citizens at the time of the commencement of the action, and who were then interested in the asserting of property held by the defendant corporation, and who have been admitted as parties at a subsequent term for the purpose of protecting their rights. I was much impressed with the plausibility and force of the views of the counsel upon this subject, but it is not necessary for me to decide the question, as there is another question involved in the case upon which the judge in the state court decided correctly in refusing to grant an order of removal to this court. From this decision an appeal was taken to the state supreme court, where it was affirmed, and I concur in the legal principles announced. *Gudger v. W. N. C. R. R.* 87 N. C. 325.

In construing the second clause of the second section of the act of 1875, Chief Justice WAITE, in speaking for the supreme court, said, in *Hyde v. Ruble*, 104 U. S. 407:

"To entitle a party to a removal under this clause there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other."

Referring to the case of *Barney v. Latham*, 103 U. S. 205, he further said:

"When two such causes of action are found united in one suit, we held, in the case last cited, there could be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants interested in the controversy, which, if it had been sued on alone, would be removable. But that, we think, does not meet the requirements of this case. This suit presents but a single cause of action; that is to say, a single controversy. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to their one controversy."

The word "controversy" is employed in the statute, and a *separate controversy* is not identical in signification with a *separable cause of action*. There may be separate remedies against several parties for the same cause of action, but there is only one subject-matter of controversy involved. Where there are separate and distinct causes of action in the same suit, either of which might have been sued on alone, then there are separate controversies within the meaning of the statute. *Boyd v. Gill*, 19 FED. REP. 145, and cases cited.

In the case before us the plaintiff alleges but one cause of action, and sues only the corporation defendant. The other defendants subsequently became parties defendant by consent, and in answer to the allegations against their co-defendants they say that they have no knowledge or information sufficient to form a belief.

When a person has been injured by the joint tortious acts of several

parties, he has, for the injury sustained, one cause of action against all; but he may seek his remedy by suing any or all of the wrongdoers. If he sues each one separately, the same subject-matter of controversy is involved in all the actions, and he can have but one satisfaction for the same injury. If he sues any one of them separately, and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy. *Sessions v. Johnson*, 95 U. S. 347. This election of remedy is a right which the law gives to a plaintiff in actions of tort, and in the case before us he elected to pursue a several remedy against the corporation defendant, and this right cannot properly be embarrassed by subsequently made defendants raising new and independent issues in the pleadings. The plaintiff alleges no cause of action against the individual defendants, and in their answer they do not admit any participation in or liability for the wrong alleged against their co-defendant. If the cause was separated as to the defendants, there would be no complaint as against the individual defendants, and consequently no issues could be made. To constitute a *controversy* in an action at law there must be an allegation on one side and a denial on the other, making an issue of fact or an issue of law.

The individual defendants claim an equitable right in the property held and employed by the railroad company, which is not the subject-matter in controversy in this action at law, and cannot in any way be material unless the plaintiff obtains judgment and seeks to have the same satisfied out of the property claimed by the individual defendants.

Under the liberal and convenient mode of procedure in civil actions in this state, parties may assert equitable rights and have them adjusted, protected, and enforced by the court in the same action; but this is not allowable in the federal courts, where legal and equitable causes of action and defense cannot be blended. *Hurt v. Hollingsworth*, 100 U. S. 100. If the cause before us was, in other respects, properly in this court, the defendants in the action at law could not in this manner avail themselves of the equities set up in their answer, which is in the nature of a cross-suit or cross-bill for injunctive relief.

As this case falls clearly within the rule stated in *Hyde v. Ruble*, *supra*, and adhered to in *Winchester v. Loud*, 108 U. S. 130, S. C. 2 Sup. Ct. Rep. 311, the motion to remand is allowed, with costs against petitioners, and the proper order may be drawn.

MUTUAL LIFE INS. CO. v. CHAMPLIN and others.

(Circuit Court, S. D. New York. July 18, 1884.)

1. REMOVAL OF CAUSE—ACT OF 1875—CITIZENSHIP.

Where all the parties on the one side are residents of different states from any of the parties on the other side, a suit containing but a single controversy may be removed by either one of the plaintiffs or defendants, under the second clause of section 2 of the act of 1875; or by all the plaintiffs or by all the defendants, jointly, under the first clause.

2. SAME—CONSTRUCTION.

The natural import of the language of one part of a statute should not be narrowed by construction though it overlap in part the provisions of another part of the same statute, where both will still have a distinct and exclusive purpose to subserve.

3. SAME—SINGLE CONTROVERSY.

Only the first clause of the above section embraces cases of a single plaintiff and defendant; only the second clause embraces cases in which removable and non-removable controversies are joined in the same suit; both clauses cover cases having several plaintiffs or defendants, and only a single controversy, and that a removable one.

4. SAME—CITIZENSHIP.

Where a controversy is a removable one under the United States constitution by reason of the citizenship of the several plaintiffs and defendants in different states, the individual right of either defendant to remove the cause has been recognized by congress in the second clause of section 2 of the act of 1875; and this clause should therefore be construed as embracing suits having but a single controversy, in furtherance of the apparent general intent of the act of 1875, to provide for the removal of causes between individuals up to the limits of the undoubted intent of the constitution, since the language of the second clause is broad enough to include this, and there is no other clause sufficient for that purpose.

Motion to Remand.

The complainant, in March, 1879, insured the life of Edmund W. Raynsford, in the sum of \$10,000, by a policy made payable to his executors, administrators, or assigns. The insured resided at Providence, Rhode Island, and died there in January, 1883. The defendant Champlin, a citizen of that state, was duly appointed administrator of his estate, and subsequently took out ancillary letters of administration in this state. The deceased left a widow and one son, Charles K. In March, 1881, he had assigned the policy to the defendant Sparrow. The validity of this assignment being contested by the administrator and the distributees of the estate of the deceased, the complainant filed a bill of interpleader in the supreme court of this state, against all the above-named claimants of the insurance money, who are all non-residents of this state, offering to pay into court the money due on the policy. The defendant Champlin removed the cause to this court, upon his own petition, under the first clause of section 2 of the act of 1875. On motion of the defendant Sparrow the cause was remanded to the state court, because all the defendants did not join in the petition, as required in a proceeding under the first clause, in which the word "party" is construed to mean all who are upon the same side of the controversy.

Thereafter the defendant Charles K. Raynsford, before answer, removed the cause to this court under the second clause, alleging in his petition that the "said policy is the property of this petitioner by virtue of certain conveyances and transfers to him from said Edmund W. Raynsford; that all the defendants are citizens of states other than the state of New York, where the plaintiff resides; and that there is a controversy in the suit which is wholly between citizens of different states, and can be fully determined as between them; and that the petitioner is actually interested therein." Thereupon the defendant Sparrow made the present motion again to remand the cause, on the ground that there is but a single controversy in the suit, and that in that case a removal can be had only under the first clause of section 2, and then only when all the defendants or all the plaintiffs unite in the petition.

Hathaway & Montgomery and H. G. Atwater, for motion.

Donald McLean, Francis Lawton, and Wm. H. Arnoux, opposed.

Brown, J. The second clause of the second section of the removal act of 1875 declares that when, "in any suit between citizens of different states, * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, * * * then either one or more of the plaintiffs or defendants may remove," etc. Here is an explicit declaration that the cause may be removed by either one of the plaintiffs or the defendants, provided certain specified conditions exist. For the purposes of this motion the averments of fact contained in the petition must be taken to be true, and the petitioner must be deemed, therefore, to be a necessary party to the action. The suit, therefore, although containing but a single controversy, fulfills literally every one of the conditions of the second clause. Is the court warranted in narrowing the scope of this clause by construction, and in annexing to it a condition not found in the statute, viz., that the suit must contain two or more controversies? I think not. The language of the second clause is, doubtless, designed to embrace suits which do contain two or more controversies, and to authorize removal at the instance of any one plaintiff or necessary defendant, provided the necessary conditions exist as respects any one distinct controversy in the suit. That may be, possibly, its most useful purpose, as it is, doubtless, the purpose for which this clause has been most frequently invoked and applied. But it does not follow that such is its only purpose. The language used in no way restricts it to suits containing two or more controversies; nor is the language such as would naturally have been chosen if such restriction had been intended. Had such been the intention, we should expect to find some such words as, "When, in any suit *containing two or more controversies*, * * * there shall be a controversy which is wholly," etc., or some equivalent expression indicating an intention to make such a limitation. The language actually chosen is such as applies equally to

suits containing one controversy or several. In substance, the court is asked to limit its effect by interpolating some such clause as that above italicized. Only clear and strong reasons could justify such a limitation of the language of the statute by construction. The reasons urged seem to me insufficient.

It is said that in no reported case has the second clause been applied to a suit containing but a single controversy. But it is equally true that there is no reported case to the contrary. It is but nine years since this clause was enacted. The question may not have been previously presented for decision, or the result may not have been thought of sufficient interest or importance to be reported.

It is further said that the phrase, "and which can be fully determined as between them," indicates that several controversies are contemplated. That is true, since that phrase would be unnecessary where there is but a single controversy in the suit. But this only shows that the clause was designed to embrace suits which do contain two controversies, as well as suits which contain but one controversy; and that when applied to a suit containing several controversies, the same conditions must exist as to that controversy which necessarily exist when there is but one controversy in the case.

Again, it is urged that this construction of the second clause leaves nothing for the first clause to act upon, and that thus the second clause would wholly supersede the first; since, if any one of several defendants or plaintiffs could remove a suit containing but a single controversy, under the second clause, there would never be any occasion to resort to the first clause, which requires all on the same side to join in the petition. It is a maxim in the construction of statutes that some effect is to be given, if possible, to all their provisions, since all are presumed to have been intended to have some effect. The general words of one part of a statute must, therefore, sometimes be limited by construction in order to give effect to specific provisions in another part. If the second clause of this section, applied according to its literal terms, would wholly supersede the first clause, the principle referred to would apply, and would require the two to be harmonized and made effectual by the application of some limitation to the second clause, which the context, or the general purpose of the statute, might indicate as the actual intention of congress. But the first clause is not wholly superseded by the literal terms of the second. The latter clause applies only where there are several parties plaintiff or defendant; because its language is, "either one or more of the plaintiffs or defendants may remove," etc. There must be, then, at least two plaintiffs or two defendants. There is nothing in the language of the second clause which can be made to apply to the case of a single plaintiff and a single defendant. But the first clause does cover the case of a single plaintiff and a single defendant, as well as of several plaintiffs and several defendants; and it therefore subserves at least one exclusive purpose.

The result, therefore, is that only the first clause will embrace suits having but a single plaintiff and single defendant; only the second clause will embrace suits having several plaintiffs and several defendants, and at the same time several controversies, some of which are of themselves removable, and some not; while in other cases, where there are several defendants or several plaintiffs, all resident in different states from those on the other side, the proceedings for removal may be taken under either clause, whether the controversies in the suit be one or several. As each of the two clauses thus has some exclusive purpose to subserve, the fact that they overlap each other in other cases like the present, in which an option exists to proceed under either clause, seems to me no sufficient reason for narrowing the scope of the second clause by the interpolation of a condition not found in the statute.

If the point raised by this motion has not been expressly decided, it has been, at least, suggested by the supreme court, without deciding the question, and without any adverse intimation, that a single controversy might possibly be removable under the second clause as well as under the first. *Removal Cases*, 100 U. S. 470.

The decisions upon the second clause are not inharmonious with the construction here given, and any different construction would involve anomalies altogether inadmissible. In the leading case of *Hyde v. Ruble*, 104 U. S. 407, the supreme court, in defining when a cause is removable under the second clause, make no mention of the existence of several controversies in the suit as one of its conditions. The court say:

"To entitle to removal under this clause, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other."

This requirement may be met as fully by a controversy standing alone, as by one joined with other controversies which are not by themselves removable. In the latter case it is the constant practice, under the second clause, to remove the whole suit at the instance of a single defendant, and this is the use to which the second clause is most commonly applied. If the present suit, therefore, contained an additional controversy affecting the present defendants, and also other defendants who were citizens of the same state with the plaintiff, then, although the latter controversy would not by itself be removable under either the first or the second clause, yet, undeniably, the whole suit would be removable under the second clause, at the instance of either of the present defendants, by reason solely of the existence of the present controversy in the suit. But if the present controversy is such as to make a whole suit removable by one defendant, though it contained another controversy not in itself removable, it must, in all reason, be removable in like manner when standing alone. It would be a gross anomaly to construe a statute in such a way as to mean that a controversy which, when joined with another controversy not removable

at all, would be sufficient to remove both at the instance of a single defendant, yet should not itself be removable in the same manner when standing alone. Such a construction would make the removability of a suit and the manner of removing it under the second clause depend, not on the character of the removable controversy, but upon its being joined with a controversy not in itself removable at all. It is not credible that any such anomaly should have been intended, and none such should be created by construction.

This view is further sustained by a comparison of the removal act of 1875 with the provisions of the federal constitution, and by the apparent intention of congress by this act to make provision for the jurisdiction of the federal courts, and the removal of suits between individuals co-extensive with the grant of judicial power. The second section of article 3 of the constitution defines the cases to which the judicial power of the United States shall extend, among which are "controversies * * * between citizens of different states." Legislation was, however, necessary to give effect to this article of the constitution. Prior to the act of 1875, congress, by the judiciary act of 1789, and the acts of 1866 and 1867, had dealt with this subject by piecemeal only, and far within the scope of the constitutional grant of power. The provisions of the act of 1875, however, seem carefully drawn so as to cover the entire limits of the constitutional provision, so far as these limits are clearly settled. The construction of the particular provisions of the removal act should, therefore, be in harmony with, and in furtherance of, that general intention, and not such as to defeat it. It is an unsettled question whether the phrase "controversies * * * between citizens of different states" means a controversy which is wholly between citizens of different states, or whether it may include controversies in which some only, but not all, of the parties on opposite sides are citizens of different states. The question was elaborately argued, but not decided, in the case of *The Sewing-machine Companies*, 18 Wall. 553. It was again referred to in *Blake v. McKim*, 103 U. S. 333, 338. In the *Removal Cases*, 100 U. S. 479, Justices BRADLEY and SWAYNE expressed the opinion that it embraces every controversy in which any of the opposing parties are citizens of different states; and entertaining that view they differed from the majority of the court, and held that the word "party," in the first clause, should have a wider construction than the word "plaintiff" or "defendant" under the judiciary act, and should include any one of several plaintiffs or defendants, and not be limited to all jointly. The constitutional question was not, however, involved in the decision of the court. In the second clause of section 2 of the act of 1875 congress has avoided controverted ground by expressly limiting that clause to controversies "wholly between citizens of different states." Such controversies are undeniably within the constitutional grant of judicial power; and where such a controversy does exist it is plainly within the constitutional provision that either one of the necessary

defendants may be empowered to remove it. The reasons for this constitutional provision apply as much to each severally as to all jointly; nor is there any good reason why a defendant should not be allowed to remove the cause against the dissent of his co-defendant, as well as against the dissent of the plaintiff. The second clause of section 2 of the act of 1875 fully recognizes this constitutional right of a single defendant, by providing that either one of the plaintiffs or defendants in the cases stated may remove the cause. When, therefore, a suit containing a single controversy is removable by reason of the residence of the opposing parties in different states, inasmuch as congress has undeniably recognized the individual right of removal, and has expressly conferred that right on a single one of several co-plaintiffs or co-defendants where another controversy, not in itself removable, is joined with it; and since, moreover, the first clause applies only to a "party," *i. e.*, to all jointly on the one side or the other,—the second clause ought, if its language will permit, to be construed in furtherance of the general constitutional right of each individual to remove a controversy which is clearly a removable cause, as being within the presumed general intention of congress, in framing the act of 1875, to provide for removal according to the scope of the constitution. There is no other clause of the act which covers the case of a single controversy so as to secure this constitutional privilege to each individual suitor. And as the language of the second clause, instead of indicating any exclusion of cases having but a single controversy, appears rather to have been chosen so as to cover all suits having several plaintiffs or several defendants which have either one controversy or several, it seems to me clear that this clause should not be narrowed by construction, but should be applied, as its language imports, to both cases alike.

The motion is therefore denied.

TURNER v. PEOPLE'S FERRY CO.

(Circuit Court, S. D. New York. July 15, 1884)

1. RIPARIAN RIGHTS—GRANT OF LANDS UNDER WATER.

Exclusive riparian rights do not attach, as a matter of course, to a grant of lands under water. Whether they do so or not depends upon the express terms of the grant, or upon the intent of the parties as shown by prior use, by the object of the grant, or by other circumstances from which the intent may be inferred. In the absence of an express grant of the right of wharfage, and of any manifest intent to convey it, no exclusive right of wharfage passes as incident to a grant by the state of land under water, below high-water mark, in a harbor or navigable stream.

2. SAME—INTERVENING STREET—NEW YORK ACT OF 1813.

An intervening public street between private owners and the exterior line of the water front, prevents the acquisition of riparian rights by the owners on

the opposite side of the street; and the act of 1813 of the legislature of New York, in providing for laying out such an exterior street, and that the upland owners, on filling in the "intermediate spaces" should be owners of the lots so filled in, negatives any intention to confer riparian rights on such owners; the right of wharfage under said act being conditioned upon such owners' building the wharves as directed by the city.

3. SAME—WHARVES.

Where the city, under the legislative act of 1813, is entitled to the wharfage along the wharves built by it, its rights are exclusive, so far as is necessary to the full enjoyment of the use of the wharves and slips up to the line of the bulk-head, and any rights of the owners of lots along the bulk-head line are subordinate to those of the city or its lessees. The act of 1857, dispensing with any exterior street, did not enlarge the intent of the act of 1813 as respects any riparian rights in the owners of "intermediate spaces" filled in.

4. SAME—INJUNCTION—FERRY.

An injunction to restrain the prosecution of a work, like a new ferry, of great public convenience and utility, should not be granted at the instance of a private party alleging threatened damage, except his right and his injury be clear.

5. SAME—CASE STATED.

The defendant being about to erect new ferry structures, under authority from the state and the city, in the slip between Twenty-second and Twenty-third streets, East river, occupying nearly half the slip in width, at a distance of 145 feet from the bulk-head, far below the original high-water mark, on motion by plaintiff for injunction as obstructing his riparian rights along the bulk-head as hitherto exercised, *held*, that no exclusive riparian rights were established in the plaintiff, and that all the access which he could legally claim was still left him, and the injunction was denied.

Motion for Injunction to Prevent the Erection of Ferry Structures.

Anderson & Howland, for complainant.

M. J. O'Brien and S. G. Clarke, for defendant.

BROWN, J. A motion is made for an injunction, *pendente lite*, to restrain the defendant from erecting its proposed ferry-rack and ferry-house along the southerly side of the Twenty-third street pier, in the slip between the wharves at Twenty-second street and Twenty-third street, East river. The defendant was empowered by act of the legislature (Laws 1882, c. 193) to establish and operate a ferry from near Broadway, Brooklyn, across the East river to Twenty-third street, New York; and to acquire the necessary franchise therefor. It subsequently acquired this franchise by purchase from the city of New York, at public auction, at a fixed yearly rental; and it also obtained a lease from the city of the Twenty-third street pier. It has given bonds for the performance of all the various conditions of the lease, and of the franchise to operate the ferry, and has submitted its plans for the proposed ferry structures. These plans have been approved by the proper city authorities; and, the defendant being about to begin the erection of these structures, the plaintiff seeks to enjoin the prosecution of the work on the ground that it will inflict irreparable injury on his alleged riparian rights as lessee of the premises along the bulk-head line at the head of the slip between Twenty-second and Twenty-third streets, by occupying nearly one-half of the slip at a distance of 145 feet directly in front of his bulk-head, thereby obstructing his business in the slip and on shore as at present conducted. The proposed ferry

is, evidently, conducive to the public convenience and utility. No irregularities are suggested in the defendant's proceedings. I must assume, therefore, that the defendant has all the authority for the erection of these structures which the city or the state could confer; and a work thus authorized, and for the public benefit, should not be arrested at the instance of a private party, unless both his right and his injury be clear and certain. *Taylor v. Brookman*, 45 Barb. 106. I am not satisfied that the proposed structures would not leave the complainant in the enjoyment of all the rights which he can legally claim; and, without reference to the other points raised, the injunction, *pendente lite*, should, on that ground, be denied.

The plaintiff, in March, 1881, leased from the executors of John L. Brower certain premises between Twenty-second and Twenty-third streets for nine years from May 1, 1881, with the privilege of a renewal for ten years afterwards. The premises leased are described in the lease as bounded on the east "along the East river," and no reference is made in the lease to any bulk-head or wharf, or to any wharfage or riparian rights of any kind. The complainant hired the premises for the purposes of a coal-yard, expecting to receive and to deliver coal in boats moored along-side the bulk-head, as he has hitherto done. His affidavit states that at times he has had 20 canal-boats moored there at once. It appears, however, that prior to this lease the Pennsylvania Coal Company, a former lessee, had been accustomed to receive and to deliver coal there in like manner, using the bulk-head as a place of landing; and that this privilege enhances the rental value of the premises. It can scarcely be doubted that this use was contemplated by the lessor, as well as by the lessee, and that the terms were in reference to it. The complainant has sublet the northerly half of his premises to Clark & Allen, who have erected thereon a grain elevator, used in connection with the landing of boats at the bulk-head. It must be assumed, therefore, under such circumstances, that the lease to the complainant was intended to pass and did pass, as an incident thereto, whatever rights of wharfage the Brower estate held. *Huttemeier v. Albro*, 18 N. Y. 48; *Voorhees v. Burchard*, 55 N. Y. 98. It could not pass more. What their rights were, is the turning point.

The premises in question are far to the eastward of the line of 400 feet below low-water mark, and hence were formerly the property of the state, from which Brower's title to the lots and his rights of wharfage, if any, must be deduced. Omitting any reference to various acts and grants by the legislature and the city, which present some complications of title, and which are set forth in detail in the elaborately considered case of *Nott v. Thayer*, 2 Bosw. 10, the view most favorable to the title and rights of John L. Brower is that which deduces the complainants' alleged title from the act of the legislature of April 9, 1813, (Laws 1813, c. 86, §§ 220, 221,) in connection with the ordinance of the common council of December 31,

1856, laying out East street. By the act of 1813 (re-enacting the act of April 3, 1798) the legislature authorized the mayor, aldermen, etc., in brief, to lay out streets or wharves in front of those parts of the city which adjoin the East river, and from time to time to lengthen and extend said streets and wharves, to be completed at the expense of the proprietors of land adjoining or nearest; that such proprietors should fill up the spaces lying between their lots and such streets and wharves; and that upon so filling up and leveling the same they should become *owners of said intermediate spaces of ground in fee-simple*.

On December 31, 1856, the mayor, aldermen, etc., passed an ordinance establishing East street as an exterior street along this portion of the East river. Without stopping to inquire whether the ordinance, and the proceeding to acquire title under it, were valid under the act of 1813, but assuming them to be so, East street as thus laid out, would cross Twenty-third street along the westerly line of Avenue C extended; and the same ordinance directed the existing numbered streets to be extended to East street, and that the proprietors of lands nearest to or opposite East street, as thus established, should make and complete the street and fill in the intermediate spaces by January 1, 1860. Before this ordinance was carried into effect, the work was arrested by the action of the harbor commissioners, appointed under the act of March 3, 1855, whose report, confirmed by act of the legislature, passed April 27, 1857, fixed the exterior bulk-head line in that vicinity, as it now exists, far within the proposed East street, and prohibited any solid filling in beyond this bulk-head line. This line is somewhat to the eastward of Tompkins street, (since discontinued,) and is between Avenue A and the extension of Avenue B. The Brower estate, it is claimed, acquired the fee of the land between Tompkins street and this bulk-head line of 1857, by filling in the "intermediate spaces," as provided by the act of 1813; but, as I must assume, it did not build either the Twenty-second street or the Twenty-third street piers, nor did it ever obtain any express grant from the city of the lots lying east of Tompkins street, or of any right of wharfage thereon. As incident to the land thus filled in, it is claimed that the Brower estate acquired riparian rights, and the rights of wharfage along the bulk-head. It is along this bulk-head, between Twenty-second and Twenty-third streets, that the complainant, as lessee, alleges that his riparian rights are threatened with injury.

As I have before said, none of the premises occupied by the complainant were any part of the original shore; they were a part of the harbor of the city of New York, and far below even low-water mark. Riparian rights do not attach, as a matter of course, to a grant of such lands under tide-water. A right of wharfage in such cases, as an incorporeal hereditament, must be derived either from the express terms of the grant, as in *Langdon v. Mayor, etc.*, 93 N. Y. 129, 150, and

in *Marshall v. Guion*, 11 N. Y. 461, or from the clear and manifest intent of the grant, as shown by the surrounding circumstances, such as prior use, or the declared intention of the grant. *Langdon v. The Mayor*, 93 N. Y. 129, 144; *Voorhees v. Burchard*, 55 N. Y. 98; *Huttermeyer v. Albro*, 18 N. Y. 48. In the absence of an express grant of wharfage, or of such manifest intention, the city or the state, as the case may be, may make successive grants of its lands under water, each in front of the former, to different grantees, without any violation of the rights of either; and neither the first nor the last grantee will acquire any exclusive riparian privileges. None of such grantees are in any proper sense riparian owners at all; and riparian rights do not attach to such grants. *Weber v. Harbor Com'rs*, 18 Wall. 57, 67. In this state, where the common law on this subject prevails, and the state is owner of the soil below high-water mark, it was long since settled that a grant of such lands, even with a right to erect a wharf expressed in the grant, was by implication of law not an exclusive grant of wharfage rights; but that such rights, so long as they were not wholly cut off, were subject to be modified and abridged through other grants and other harbor regulations for the public benefit, without compensation. *Lansing v. Smith*, 8 Cow. 146; 4 Wend. 9, 22-24. And in the case of *Gould v. Hudson River R. Co.* 6 N. Y. 522, it was held by the court of appeals that an owner of upland along high-water line on the Hudson river had no exclusive riparian rights below that line, and hence sustained no legal damage from a railroad embankment built under a grant from the state which cut off his access to the river. This decision has never been questioned as a rule of property in this state. See *People v. Tibbetts*, 19 N. Y. 523, 528; *People v. Canal Appraisers*, 33 N. Y. 461, 487. It was cited, and its principles reaffirmed, in the recent case of *Langdon v. Mayor, etc., supra*, where the decision rested upon an express grant of wharfage rights.

As establishing a law of property, these decisions would be binding, I think, under section 721 of the United States Revised Statutes, as rules of decision in the federal courts, even if there was no authority in the supreme court on this subject. *Barney v. Keokuk*, 94 U. S. 338. But the decisions of the supreme court are of precisely the same effect. In *Yates v. Milwaukee*, 10 Wall. 504, (relied on by the complainant's counsel,) the rights of even a strictly riparian proprietor are declared to be "subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever these rights may be." But in the subsequent case of *Weber v. Harbor Com'rs*, 18 Wall. 57, the supreme court held that a grant from the state of land under water in the harbor of San Francisco up to the exterior line of the bulk-head, where the city already had by law the control of the wharves and of wharfage rights, did not confer on the complainant any riparian rights as against the city; and his bill, filed to prevent such rights from being wholly cut off, was dismissed. That case, in all essential particulars,

was analogous to the present. It is true that the complainant there had built out a wharf for his own use. But the complainant here claims certain exclusive privileges in the slip beyond the bulk-head, which involves the same principle. It was not there proposed to abate the complainant's wharf as a nuisance, but to surround it by a larger wharf, and appropriate it to the public use. Had the complainant there been held to have had any right to exclusive privileges along his bulk-head, he would have been entitled to his injunction or to compensation. But the court say:

"The complainant is not the proprietor of any land bordering on the shore of the sea in any proper sense of the term. * * * There is no just foundation for his claim as riparian proprietor. He holds, as his predecessors took the premises, freed from any such appendant right. * * * They took whatever interest they obtained in subordination to the control by the city over the space immediately beyond the line of the water front, and the right of the state to regulate the construction of wharves and other improvements. * * * Having the power of removal, (of the complainant's wharf,) she could, without regard to the existence of the wharf, authorize improvements in the harbor, by the construction of which the use of the (complainant's) wharf would necessarily be destroyed." Pages 65-67.

The same principles were again affirmed and applied in *Barney v. Keokuk*, 94 U. S. 324, and in the recent case of *The Potomac Steam-boat Co. v. Upper Potomac Steam-boat Co.* 109 U. S. 672, S. C. 3 Sup. Ct. Rep. 445, where it was held that a public street intervening between complainant's lots and the established river front, cuts off any exclusive riparian rights in the owner of the lots on the opposite side of the street, whether the fee of the street be in the public or not, the complainant not having any express grant of wharfage rights.

The federal decisions are in accord, therefore, with those of this state, so far as respects riparian rights attaching to grants of land under water in harbors or along navigable rivers. I find no case where any such exclusive rights are recognized, unless they are derived from the state or the city in express terms, or else by necessary implication from the circumstances of the grant. But if the act of 1813 and the ordinance of 1856 be looked to as sources of the grant of a right of wharfage, no allusion to wharfage or to any riparian rights, on the part of those filling in the intermediate spaces, is found there, except on condition of their having built the wharves or piers, which it is not here claimed that they did; and the whole tenor of both the act of 1813 and the ordinance of 1856 is manifestly inconsistent with the idea that the owners who should fill in the intermediate spaces were otherwise to acquire any right of wharfage, or even any title to lots to the water's edge, so as to become riparian owners at all. Under the ordinance of 1856, East street was to be an exterior street which would separate such proprietors from the water front, and under the act of 1813 an exterior street, like West street or South street, was also contemplated; but even had not such an exterior street been designed to intervene under the ordinance of

1856 and the act of 1813, to cut off any riparian ownership from those who might fill in the "intermediate spaces," still the act of 1813 itself manifestly confers on the city the right of wharfage on the wharves to be built out by it from the extended streets, and the control of wharfage rights. Subsequent acts have repeatedly confirmed this right. *Langdon v. The Mayor*, 93 N. Y. 144, 145. The wharves form the slips; and without the protection of the wharves, in the rapid tides of the East river, the bulk-heads themselves would be comparatively impracticable for use. The slips are so narrow, being not much above 200 feet wide, that the exercise of unrestricted rights of wharfage by an owner along the line of the bulk-head would, moreover, be plainly incompatible with the exercise of the same rights by the city upon its own wharves on each side of the slips. The slips formed by the wharves are appurtenant to and for the use and benefit of the wharves, and of the city which owns them, and of the public which is entitled to the full use of them; not for the use or benefit of the bulk-head owners. Without the full and, it may be, exclusive use of the slips, the full use of the wharves cannot be enjoyed. If an owner along the bulk-head line can lawfully moor six, eight, ten, or even twenty canal-boats at once along-side the bulk-head, tier upon tier, as it is said the complainant sometimes has done, he may thus occupy the whole slip and exclude the public from the wharves altogether, and the city from its rightful wharfage and use of the slip. On the other hand, the full enjoyment of the wharves by the city or its lessees for wharfage purposes, may, if the public needs require it, demand the use of the entire slip. There cannot exist, therefore, full riparian rights of wharfage in both parties at the same time. The act of 1813 leaves no possible doubt which of the two—the city which builds the wharves, or the owner who fills in intermediate spaces and thus becomes owner of the bulk-head lots—is intended to enjoy this right of wharfage. All that the act of 1813 gives to the latter is the title to the "intermediate spaces;" an exterior street, as I have said, being contemplated by that act, which would exclude him from the enjoyment of riparian rights; while the city is to take the benefit of the wharves which it builds, and with them the use of the slips for the purposes of wharfage. No intention to confer riparian rights on the owner of spaces filled in can be deduced from the act of 1857, which prevented the construction of the proposed exterior street.

As the estate of Brower, therefore, obtained no right of wharfage by the terms of any grant, nor by any intention of the city or state, from whom it derives title, it has not, in my judgment, any legal right, as against the city or its grantees, to convert the bulk-head into a wharf, and maintain it as such as a means of private emolument; nor even any proprietary right to the use of the slip adjoining the bulk-head as a place for landing its own boats, to the exclusion of any necessary use by the public under the city or its lessees. It may doubtless land boats there by sufferance, as any other citizen might

do; but it has no right to obstruct the use of the slip, or of any part of it, which may be required by the public in mooring boats along either the Twenty-second or Twenty-third street wharves up to the line of the bulk-head, nor to interfere with any other appropriate use of a wharf, such as a ferry landing, which the city and state may authorize.

This case differs from all others which have been cited in support of the injunction, in the fact that the complainant and those whom he represents have neither any title to the slip or to the land in front of the bulk-head, nor any express grant of a right of wharfage, nor any evidence of any intent by the state or city to grant such a right. The case of *Lansing v. Smith, supra*, as above observed, long since decided that even if wharfage had been granted, subsequent obstructions in front, necessary for the public convenience, were no grounds for a claim of damages, so long as access, though impaired, still remained. In the present case a basin of 145 feet long by the wharf will remain free along the upper part of the bulk-head; while the lower part, embracing more than one-half the complainant's frontage, will be completely open and unobstructed as before.

The papers before me do not show any legal rights in the complainant beyond this means of access still reserved to him by the proposed structures; and without referring to the other points raised, the motion should, upon the above ground, be denied.

PHILADELPHIA & READING COAL & IRON CO. v. THE MAYOR, etc.

(Circuit Court, S. D. New York. July 21, 1884.)

1. LESSOR AND LESSEE—TITLE OF LESSOR—LESSEE CHARGED WITH NOTICE OF RIGHTS OF LESSOR.

A lessee is charged with full notice of the terms of a grant of the leased premises to his lessor, and his rights are subject to those terms, unless subsequently released or extinguished.

2. SAME.

Where a grantee acquires wharfage rights in the premises, his lessee, as against the grantor, may exercise similar rights, subject only to the terms of the grant to his lessor; and aside from those terms, only the lessor could question the lessee's right to an easement over the remaining lands granted to the lessor.

3. SAME—INJUNCTION—LESSEE'S RIGHT TO CONTINUANCE OF.

Where a lessee is in possession of valuable wharfage privileges, he has a right to a continuance of an injunction to restrain the cutting off of those privileges until his legal rights are compensated for under the act of 1871, requiring the dock department of the city to make such compensation.

In Equity.

Mitchell & Mitchell, for plaintiff.

E. H. Lacombe, for defendant.

BROWN, J. The dock department of the city of New York, under the act of 1871, is required to provide for compensation to the owners of existing wharfage rights before building the exterior wall in the Hudson river which would cut off those rights. I cannot doubt that the complainant and its receiver are lawfully possessed of certain wharfage rights and privileges along the wharf erected inside of the line of Twelfth avenue, upon the land leased from the estate of Cornelius Ray, and that these rights are of some value, although they might possibly be abridged or destroyed hereafter through proceedings taken by the city and the estate of Ray, or its successors, in accordance with the terms of the grant by the mayor, etc., in 1838. The complainant is chargeable with full notice of the terms of that grant, and their rights are subject to those terms, unless they have been subsequently released or in some way extinguished.

Under the grant by the city to the estate of Ray, which expressly conveyed the right to wharfage along Twelfth avenue, which was then the city's exterior line of land under water, I think wharfage rights might be exercised by that estate inside of the line of Twelfth avenue, so long as the lots under water were not filled in, as well as along its western line; and the lessees from Ray's executors might, therefore, as against the city, exercise similar rights, subject only to the terms of the grant to their lessors, requiring the streets to be filled in, on three months' notice; and, aside from those terms, only Ray's estate could question their lessee's right to an easement over the estate's remaining lands under water out to the exterior line of Twelfth avenue. Being then lawfully in possession of wharfage privileges of some value, complainants have a right to a continuance of the injunction until their existing legal rights, so long as they shall exist, are compensated for under the act of 1871; and the motion to vacate the injunction must be denied. But the injunction must not be so construed as to prevent any enforcement by the city of the terms of its grant to Ray's estate, or any preliminary steps, by notice or otherwise, necessary thereto. Other parties and other questions than those now before the court are involved in any proceedings of that kind which might affect the complainant's rights; and if the complainant has any grounds on which to oppose the enforcement of those terms, they should be presented by an appropriate action, and with all the necessary parties before the court, after some proceedings to enforce the terms of the grant have been had, or appear about to be taken. A modification of the injunction to that extent may, if desired, be had.

THE EXCHANGE BANK TAX CASES.

WILLIAMS v. BOARD OF SUPERVISORS OF THE COUNTY OF ALBANY.

(Circuit Court, N. D. New York. July 23, 1884.)

1. TAXATION OF NATIONAL BANK SHARES BY STATE—ACT OF LEGISLATURE OF NEW YORK—LAWS 1883, CH. 345—VALIDITY.

The legislature of a state cannot validate a tax which is prohibited by the laws of the United States; but it is competent for it to sanction retroactively such proceedings in the assessment of a tax as they could have legitimately sanctioned in advance.

2. SAME—ACT OF NEW YORK LEGISLATURE OF 1881, CH. 271—THE DEFECT IN THAT ACT.

In the act of 1881, c. 271, Laws New York, the fatal vice was the denial of an opportunity to those assessed to be heard and permitted to obtain the deductions and corrections allowed by the general system of assessments.

3. SAME—VALIDATING ACTS.

The general rule has often been declared that the legislature may validate retrospectively any proceedings which they may have authorized in advance; and it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation.

4. SAME—VALIDATING ACT—PAYMENT OF TAXES IN ADVANCE OF OPPORTUNITY TO BE HEARD.

If it was within the power of the legislature to provide for the collection of a tax by a system which requires the tax-payers to pay in advance of an opportunity to be heard, but permits them to have a subsequent hearing and to obtain restitution, if restitution ought to be made, the validating act was constitutional.

5. SAME—SUMMARY METHODS OF DISPOSSESSION UNDER TAXATION—OTHERWISE IN JUDICIAL PROCEEDINGS.

In judicial proceedings due process of law requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated to or under the power of taxation, different considerations from those which prevail between individuals obtain. It is not indispensable that a hearing be secured before assessment or before collection of the tax; but it is sufficient if reasonable provision is made for a hearing afterwards, a correction of errors, or a restitution of the tax or part of a tax unjustly imposed.

At Law.

Matthew Hale, for plaintiff.

Peckham & Rosendale, for defendant.

WALLACE, J. This action is brought to recover certain taxes assessed against the plaintiff and several assignors of the plaintiff, in the years 1877, 1878, and 1879, and collected by the defendant. The persons thus assessed were stockholders of the National Albany Exchange Bank, of the city of Albany. The assessors omitted in those years to place the names of the shareholders upon the assessment roll in accordance with the requirements of the state laws regulating assessments; and it was held by this court in *Albany City Nat. Bank v. Mahar*, 6 FED. REP. 417, that such omission rendered the tax illegal, because the requirement which was disregarded by the assessors was designed to afford tax-payers an opportunity for the

examination and revision of their assessments, and therefore should not be deemed directory merely, but essential, and a condition precedent to the validity of the tax.

It is insisted for the plaintiffs that the taxes thus collected were illegal, for the additional reason that the assessors violated the rule of uniformity prescribed by section 5219, Rev. St., which prohibits the taxation of shares in national banks at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. This contention rests upon the fact that the assessors habitually and intentionally adopted the practice, in assessing individuals upon bank shares held by them in various banks of the city of Albany, of estimating the value of the shares at par, and assessing them at that valuation less a deduction of the assessed value of the real estate of the bank, although, as a matter of fact, the value of such shares differed in different banks, so that while the shares in all the banks were really worth more than their par value, the shares in some of them were worth less than the shares in others. It does not appear affirmatively that the rule of valuation thus adopted operated to assess the shares of the stockholders here, higher in proportion to their value than moneyed capital generally. It was applied alike to shares in national banks and shares in state banks, and it is not shown how the capital of individual bankers was valued. The action of the assessors may have been a palpable violation of their duty under the laws of the state; and it has been so characterized in the opinions of the judges of the state courts, when the validity of the assessments has been questioned; but it does not follow that it was an unfair discrimination against shareholders of national banks, and therefore in contravention of the federal law. The question, however, is not an open one in this court, it having been decided adversely to the plaintiff upon the same state of facts in *Stanley v. Board of Sup'rs*, 15 FED. REP. 483. The disposition which must be made of this question is fatal to the plaintiff's case, because the case does not turn upon the point of the illegality of the original assessments. That point has already been decided in favor of the plaintiff. The case turns upon the efficacy of the curative act passed by the legislature of the state to validate the assessments in controversy. Chapter 345, Laws 1833. Undoubtedly, the legislature could not validate a tax which was prohibited by the laws of the United States; but it was competent for them to sanction, retroactively, such proceedings in the assessment of the tax as they could have legitimately sanctioned in advance.

The act of 1833 is the second legislative attempt to validate the taxes in dispute. The prior act (chapter 271, Laws 1831) was adjudged by this court, in *Albany City Nat. Bank v. Maher*, 9 FED. REP. 884, unconstitutional, because it was in effect a legislative assessment of a tax upon a body of individuals, without apportionment or equality as between them and the general body of tax-payers.

The fatal vice of the act was the denial of an opportunity to those assessed to be heard and permitted to obtain the deductions and corrections allowed by the general system of assessments.

The present act is carefully framed to obviate the objections which were fatal to the former act. It legalizes and confirms the assessments contained in the assessment rolls for the several wards of the city of Albany for the years 1876, 1877, and 1878, and on file in the office of receiver of taxes, subject to the right of the parties interested to claim any deduction from or cancellation of the assessments to which they would have been entitled, under the laws existing when the respective assessments were made; and it provides for a reasonable notice, and a reasonable opportunity for the parties to be heard, and to obtain such deductions or remission of the tax as may be just. It also provides for restitution to all the parties of any sum improperly included in the tax, with interest from the time the tax carried interest.

The only objection to the validating act, which seems to deserve consideration, is found in the circumstance that the tax-payers have not been given an opportunity to be heard until after they were compelled to pay their taxes. The general rule has often been declared that the legislature may validate, retrospectively, any proceedings which they might have authorized in advance. And it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which did not exist originally. In a large class of cases this is the paramount object of such legislation. If, therefore, it was within the competency of the legislature to provide for the collection of a tax by a system which requires the tax-payers to pay in advance of an opportunity to be heard, but which permits them to have a subsequent hearing and to obtain restitution, if restitution ought to be made, the validating act was constitutional.

Under the power of taxation the property of the citizen is appropriated for the public use to the extent to which he should contribute to the public revenues, and he is liable to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute. He cannot be deprived of his property, even under the power of eminent domain, without due process of law; or, in other words, without notice and an opportunity to be heard; and this is an essential requisite of every lawful proceeding which affects rights of property or of person. In judicial proceedings due process of law requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated to the public use under the power of eminent domain, or under the power of taxation, different considerations from those which prevail in controversies between individuals obtain. Thus, when property is taken under the power of eminent domain by the state, or by municipal corporations by state authority, the adjudications sanc-

tion the validity of laws which permit the property of the citizen to be appropriated before a hearing, and before compensation. It is sufficient if provision is made by the law by which the party can obtain compensation, and for a hearing before an impartial tribunal to award the compensation. And it is assumed by the decisions in these cases that the property of the municipality is a fund to which he can resort without risk of loss. *Cooley*, Const. Lim. 560, 561. There seems to be no reason for a different rule when the money of the tax-payer is appropriated by the sovereign power under the right of taxation. The reason why a right to be heard by the tax-payer respecting the imposition of a tax is valuable and essential for his protection, is in order that he shall not be obliged to bear a disproportionate part of the public burden. If the taxing laws secure him in this right as effectually as is deemed sufficient in laws authorizing his property to be taken under the power of eminent domain, it would seem, upon analogy and upon principle, that he is protected sufficiently, and that the taxing laws would not contravene the constitutional prohibition.

Undoubtedly, it is beyond the power of the legislature to validate the acts of taxing officers of a character which cannot be justified as an exercise of the taxing power; as where a part of the property in a taxing district should be assessed at one rate and a part at another, or if persons or property should be assessed for taxation in a district which did not include them. And it is stated in general terms, by a text writer of high authority, that a validating act cannot cure the illegality of an assessment made without any notice to the persons interested. *Cooley*, Tax'n, 227, 228. The case of *Marsh v. Chesnut*, 14 Ill. 223, and *Billings v. Detten*, 15 Ill. 218, are referred to as sustaining the proposition. These were cases where the curative act was held bad for the same reason that the curative act of 1881 was held to be nugatory by this court,—because it did not provide for an assessment upon notice to the tax-payer, and thus perpetuated the vice of the original assessment. The present act, as has been said, is framed to obviate this objection. No adjudged case has been cited by counsel or has met the attention of the court where such an act has been considered. It is asserted in many cases that notice and an opportunity for hearing of some description are matters of constitutional right; but it has nowhere been declared that it is indispensable that the hearing should be one in advance of the collection of the tax. The operation of the present act is to preserve, substantially, to the tax-payers the right of which they were originally deprived, to give them an opportunity to question the justice of the assessment, and to restore to them the sums which were illegally collected of them. In view of the large and almost unlimited discretion which resides in the legislature to regulate the mode and conditions of taxation, it is believed to be valid and effectual to legalize the proceedings here.

Judgment is ordered for the defendant.

ZEILIN v. ROGERS.

'Circuit Court, D. Oregon. July 25, 1884.)

1. ADVERSE POSSESSION.

The open and exclusive use of real property, for the purpose to which it is ordinarily fit or adapted, accompanied with a claim of ownership by the occupant, constitutes adverse possession, and the erection of a fence or other artificial boundary, to indicate the limits of such possession, is not essential thereto.

2. PLEA OF THE STATUTE OF LIMITATIONS.

In an action to recover possession of real property the defense of the statute of limitations should be pleaded directly, as that the cause of action did not accrue within the prescribed period next before the commencement of the action; but the allegation that neither the plaintiff nor his grantor was seized or possessed of the premises during that period, is sufficient to allow proof of adverse possession by the defendant inconsistent with the plaintiff's right to maintain the action.

3. AMENDMENT AFTER VERDICT.

In the furtherance of justice, the defendant may be allowed to amend such a defense after verdict, so as to make it conform to the ultimate fact proven, —that the action did not accrue, etc.

4. PROOF OF POSSESSION.

The fact that the plaintiff's grantor abandoned or relinquished the possession of the premises in controversy to the defendant absolutely, for any cause or consideration, and that the latter thereupon took and held such possession to the exclusion of such grantor and his assigns, may be shown by parol in support of the defense of the statute of limitations.

5. ASSESSMENT ROLL.

The fact that a parcel of land does not appear on the assessment roll of the county in a given year as the property of the defendant, in an action for the recovery of the same, does not tend to contradict the testimony of such defendant to the effect that he paid the taxes thereon, as owner, in such year; nor is it competent evidence in such action, for or against either party, of the ownership of such land.

Action to Recover Possession of Real Property. Motion for a new trial.

This action is brought to recover the possession of two parcels of land situate in Yamhill county, Oregon, and for the rents and profits of the same during their detention from plaintiff. It is alleged in the complaint that on January 1, 1875, one Susan R. Hall was the owner in fee of the two parcels; that William F. Hall was then her husband; that on that day she died, leaving him surviving her, whereupon he became and was tenant by the curtesy of an estate for his life in the premises; that the plaintiff, by mesne conveyances, has become the owner of this life-estate, which is of the value of \$1,000, and is entitled to the rents, issues, and profits of the premises from November 8, 1875; that on said November 8th the defendant ousted the said Hall from the premises and took possession thereof, and has ever since withheld the same from the said Hall and his assigns, and from the plaintiff, and that the value of said rents and profits since said day is \$3,250, and their present value is \$1,000 a year; wherefore, the plaintiff prays judgment for the possession of the premises,

and for the value of the rents and profits, past and accruing, with costs.

By his answer the defendant denies the several allegations of the complaint, except those concerning the value of the premises, the relation of William F. to Susan R. Hall, and her death, but he avers that her death took place on March 28, 1868, and that he has been in the exclusive possession of the premises and withheld the same from said Hall and the plaintiff since July 14, 1868. The answer contains two special pleas or defenses. The first one is made under section 318 of the Code of Civil Procedure of Oregon, to the claim for rents and profits, and is to the effect that since July 14, 1868, the defendant has claimed and held the premises, under color of title, adversely to the claim of the plaintiff and his grantors, and that during said period has made permanent improvements thereon, in good faith, of the value of \$2,000. The second one is intended as a plea of the statute of limitations in bar of the action, and is in these words:

"That the said Susan R. Hall departed this life on March '8, 1868, and that neither the plaintiff, his ancestor, predecessor, or grantor, was or has been seized or possessed of the premises described in the complaint and in question in this action, or any part or portion of the same, within ten years last past, prior to the commencement of this action, nor since July 14, 1868."

The Code of Civil Procedure (sections 3 and 4) provides that an action for the recovery of the possession of real property "shall only be commenced within 20 years after the cause of action shall have accrued;" and adds, "and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 20 years before the commencement of the action." By the act of October 17, 1878, (Sess. Laws Or. p. 21,) this period of limitation was reduced to 10 years. Instead of pleading the bar of the statute directly and properly, as that the plaintiff ought not to have or maintain his action against the defendant because the cause thereof did not accrue within 10 years before the commencement of the same, the latter merely alleges that neither the plaintiff nor those under whom he claims have been seized or possessed of the premises within 10 years, from which the inference may be made that neither of them was disseized or dispossessed of the premises within that time, and therefore no cause of action accrued to either of them within that period on such account.

The answer, as required by section 316 of the Code of Civil Procedure, also contains a statement of the nature and duration of the defendant's estate in the premises and that of his co-tenants, to the effect that he is the owner in fee of fifty-one sixty-fourths of the first parcel described in the complaint, and that other persons, known and unknown to him,—naming the former and the immediate ancestors of the latter,—are the owners in fee of the remaining thirteen sixty-

fourths thereof, in common with him, and that he holds the whole of said parcel for himself and said co-tenants; and that as to the second of such parcels he is the undivided owner in fee of the same. The plaintiff, replying to the answer, controverts the allegations in the special defenses and statement of the defendant's estate in the premises.

The case was tried before the district judge, with a jury, on November 28, 1882, and there was a verdict for the defendant. On the trial the plaintiff showed title to the first parcel of the premises, containing 235.75 acres, from the United States to Samuel McSween and wife, its donees, under the donation act of September 27, 1850; and to the second parcel, containing 37.50 acres, from the same source to Stephen Beauchamp, and by proper mesne conveyances from said donees to Susan R. Hall, and then put in evidence a deed from William F. Hall to Sidney Dell, the plaintiff's attorney, dated February 14, 1880, of the "life-interest" of said Hall in the premises, and of his claim for rents and profits, for the consideration of \$50; a deed from Dell to W. T. Newby of an undivided half of the premises, of the same date; a deed from Dell of the other undivided half to the plaintiff, dated April 16, 1880; and one from Newby to the plaintiff for his undivided half, of the same date.

The defendant called William F. Hall as a witness, and asked him the question: "Were you in possession of the premises in controversy on the death of your wife, Susan R. Hall, in March, 1868, and for six weeks afterwards, and did you, in July of that year, turn over the possession of the premises to the defendant?"—counsel for the defendant stating at the time that the object of the question was to sustain the defendant's right to the possession of the premises against the witness and his assigns by reason of the lapse of time. The question was objected to as immaterial, because the statute of limitations had not been pleaded by the defendant. The objection was overruled, and the ruling excepted to. In answer to the question the witness testified as follows:

"I remained on the premises some six weeks or two months after my wife died, when I delivered the premises all over to the defendant. Since then I have not exercised or claimed any authority over the premises. The defendant has occupied the premises ever since, and I have never claimed any interest in the property as against him. Since I turned the property over to the defendant he has been in possession as owner, and claimed to be the owner to my knowledge, and I have never made any claim to it. I did not feel or think that I ever had any curtesy or life-estate in the premises after my wife's death, but Dell said I had, and I made him some kind of a conveyance in 1880. My wife died in March, 1868; but I did not yield up any right of my daughter in the premises to the defendant."

The defendant, to maintain the bar of the statute, also offered to prove by himself that since July, 1868, and for more than 10 years prior to the commencement of this action, he had paid all the taxes on the land as his own; to which evidence the plaintiff objected for

the same reason, but the objection was overruled and the evidence admitted; and also that in 1868, after the death of his wife, said Hall claimed an interest of some sort in the premises—he did not know what—and wanted to go away; and that he purchased of him what he claimed to be his (Hall's) interest in the premises, including growing crops, furniture, and an old horse, for \$300, rating his interest in the land at \$150, though he did not understand what Hall's right was, and that, so far as Hall was concerned, he had occupied the premises ever since as his own, and has since purchased the interest of his daughter and heir of his wife therein, (for which it appears that he received a deed from said Hall, as the guardian of said daughter, on November 6, 1875;) to which evidence the plaintiff objected for the same reason, and the further one, that a sale of an interest in land could not be shown by parol; but the objection was overruled and the evidence admitted. To both these rulings exceptions were duly taken.

To rebut the defendant's testimony as to the payment of taxes, the plaintiff offered in evidence certified copies of the assessment rolls of Yamhill county from 1868 to 1876, inclusive, to show that the premises had not been assessed to the defendant during those years; to the admission of which the defendant objected as immaterial, and the objection was sustained by the court, because it did not appear from said assessment rolls who had paid the taxes in question; to which ruling the plaintiff excepted.

The plaintiff requested the court to charge the jury that the defendant not having introduced any evidence or claim under a paper title to the smaller of the two parcels of land, before they could find that he was in the adverse possession of the same for 10 years prior to the commencement of the action, "they must be satisfied that he lived on one or both parcels during that entire period, and had it under inclosure for the entire ten years;" and also, "that without a paper title the defendant could only maintain a right by adverse possession to that *which he actually incloses* for the whole ten years prior to the action." These instructions the court refused to give, but charged the jury that any other evidence of actual possession was sufficient in a settled farming country where there are known boundaries to claims and possessions; that it was sufficient if the defendant exercised ownership over the premises. If he occupied them as his own for 10 years prior to the commencement of the action, not intending to recognize or allow that Hall had any interest or estate therein, the action is barred; and as the plaintiff has admitted in open court that if the statute of limitations is well pleaded he is barred from recovering the north half of the larger parcel, your inquiry upon this point will be confined to the south half of such parcel and the smaller one; to which refusal and instruction the plaintiff excepted.

The jury, in addition to the general verdict for the defendant,

found, in response to questions submitted to them by the court, (1) that the defendant, at the commencement of this action, April 21, 1882, had been in the occupation and possession of the premises in controversy adversely to W. F. Hall, under whom the plaintiff claims, for more than 10 years, claiming the same as against said Hall as his own exclusive property; and (2) that said Hall was aware of the defendant's occupation and possession, whatever it was, and never did make or assert any claim to any interest or estate in the premises after he left them in 1868.

There was also evidence in the case tending to prove that the two parcels of land were contiguous, and that they had been inclosed for more than 20 years, and that during the greater portion of that time they had been occupied as one farm; and that they were inclosed anew by the defendant some eight or nine years before the commencement of this action.

The motion for a new trial is made on two grounds: *First*, the verdict is contrary to law and evidence; *second*, errors of law included in the foregoing exceptions, as follows: (1) The admission of evidence to prove adverse possession by the defendant, when the statute of limitations was not pleaded; (2) the refusal to admit the assessment rolls to rebut the evidence that the defendant had paid the taxes on the premises; (3) the admission of the parol evidence as to the plaintiff's purchase of Hall's interest in the premises in 1868; and (4) the refusal of the court to charge the jury, as requested by the plaintiff, upon the subject of inclosure, and the error in the charge actually given.

Sidney Dell, for plaintiff.

William Strong and *H. H. Hurley*, for defendant.

Before FIELD and DEADY, JJ.

FIELD, Justice. A new trial must be denied. The testimony of Hall as to his possession of the demanded premises in 1868, after the death of his wife, his delivery of that possession to the defendant, with his intended relinquishment of all interest in them, was admissible to show when the defendant took possession, and also its open and exclusive character. If to it we add the testimony of the defendant himself, given in his own behalf, the adverse character of his possession is well shown, and the finding of the jury is fully justified. More than 10 years had elapsed between the abandonment of Hall and the entry of the plaintiff thereon, and the commencement of the action, and thus a bar to the plaintiff's recovery was created, even supposing he had a specific conveyance of Hall's original interest in the premises as tenant by the curtesy. The deed of Hall to Dell is not set forth in the exceptions, though it is stated therein to be of his "life-interest," with a special warranty "against himself and those claiming under him." Hall testified that he never made any claim to the property or any interest therein after he gave possession to the defendant, and in fact did not think he had any, and so told

Dell at the time the latter obtained his deed. It is therefore probable that the deed, in effect, only amounted to a quitclaim,—a relinquishment, merely, of possible rights, instead of a specific conveyance of a certain interest,—a probability which is much enhanced by the very small consideration given for it. But, treating it as a conveyance of whatever interest Hall then had in the premises, it was too late to affect the rights acquired by the defendant by means of his 10 years' exclusive and uninterrupted possession.

It is true, the statute of limitations is not pleaded directly, or in a manner that can be called good pleading. But it is averred in the answer, that neither the plaintiff nor his grantor was seized or possessed of the premises for the statutory period of 10 years prior to the commencement of the action; and also that the defendant was in the exclusive possession of the premises during that period. And it is evident that the defendant relied upon this possession, which was undisturbed, as a defense. A cause of action could not accrue against him in favor of the plaintiff for the recovery of the premises during such possession.

Neither has the plaintiff been in any respect prejudiced in the presentation of his cause by the inartificial manner in which the defendant has stated his defense of the statute. And, if it were necessary, the defendant would be now allowed to amend his answer in this respect. Errors and defects in the form and even the substance of a pleading may, "in the furtherance of justice," be amended after verdict, "when the amendment does not substantially change the cause of action or defense by conforming the pleading to the facts proved." Code Civil Proc. § 99. If the plaintiff was not satisfied to go to trial on this defense, either on account of its form or substance, he should have objected to it at the proper time, by motion or demurrer.

There was no error in the instructions of the court to the jury. Neither residence upon land nor its inclosure by artificial means is absolutely necessary to create an adverse possession, even where the premises are not claimed under color of title. Either of these circumstances is strong evidence to establish such possession; but it may be shown in other ways. A subjection of the land by the claimant to such uses as it is ordinarily susceptible of, to the exclusion of others, is an adverse possession; and that subjection may appear by its cultivation or occupation for the ordinary purposes of husbandry or pasturage. The extent of the land to which an adverse possession is claimed must, of course, be clearly indicated, so that others may see and respect it; but it need not be shown by an artificial inclosure. It is to an inclosure of that kind that the instruction asked and the one given in the charge of the court evidently had reference. The former speaks of an adverse possession of land within limits which the *defendant actually incloses*. "In a settled farming country," says the judge, "where there are known boundaries to

claims and possessions, it is sufficient if the occupant exercise ownership over the land." Other objects than an artificial structure in the nature of fences may mark the limits of the possession claimed; such as ravines, water-courses, and the like. And furrows in the field, mounds at short distances apart, and many other devices, not constituting strictly an inclosure, may equally answer the purpose. The subjection of the land to the uses of the claimant, to the exclusion of others, and the identification with reasonable certainty, according to the circumstances of the case, in some visible or appreciable way, of its extent, are the material facts necessary to establish the adverse character of the possession. In many decisions an inclosure is spoken of as essential, because the limits of the land in question could only be marked conveniently in that way. But the essential fact is the indication, given by the inclosure, of the limit to which the possession claimed extends. None of the authorities deny the equal efficacy with an artificial inclosure of other defined boundaries or means of indicating the limits of a tract to which the possession of an occupant extends. In the present case there was evidence tending to show that the premises in controversy claimed by the defendant had been inclosed with a fence more than twenty years, though the inclosure had been renewed eight or nine years previous to the commencement of the action.

The objection that the transfer of Hall's interest to the defendant was attempted to be shown by parol, was not well taken. The evidence was not offered or received to show such transfer,—which could only be done by deed,—but to prove that Hall abandoned the possession and surrendered it absolutely to the defendant, who thereupon entered upon the land and held it adversely.

The refusal to admit the assessment rolls in evidence is so obviously correct as to require no consideration.

Motion for a new trial denied.

MACK and another v. SLOTEMAN and another.

(Circuit Court, E. D. Wisconsin. May 27, 1884.)

1. CONTRACT — GUARANTY — HEATING APPARATUS — ALTERATION OF PROPOSED BUILDING.

Under a contract by which the manufacturers of a steam-heater and ventilator introduced such an apparatus into a building in course of erection and guarantied its efficient working, they should not be held liable under their guaranty if the design of the building, as submitted to them, was afterwards altered, without their consent, so as to materially change the proposed location of windows, fire-places, chimneys, etc., or so as to substantially change the construction of the apparatus itself, thereby reducing the heating power of the apparatus.

2. SAME—NEGLECT OF PLAINTIFF.

After the introduction into a building of a steam-heating and ventilating apparatus the manufacturers of the latter should not be held liable, under a

guaranty of its efficient working, if the proprietor of the building or his servants neglect to fire the furnace to a sufficient intensity, or omit other acts necessary in that connection.

3. SAME—FACT FOR THE JURY.

In an action based upon the guaranty of the manufacturers of a steam-heating apparatus for its efficient working, the jury is to decide upon how far a change in the construction of the building affected the efficiency of the apparatus, and also whether a lack of such efficiency was caused by the neglect of the plaintiff or his servants to fire the boilers sufficiently, or otherwise properly manage the apparatus.

4. SAME—MEASURE OF DAMAGES.

The measure of the plaintiff's damages, if the defendants have broken their contract to heat his building with their apparatus, is the difference between the value of the apparatus in its alleged defective condition and what its value would have been if it had met the requirements of the contract.

5. SAME—EFFICIENCY—PLAINTIFF'S FRAUD.

If the fact be that the apparatus placed in plaintiff's building by defendants in all substantial respects fulfilled the requirements of the contract, and the architect or superintendent fraudulently or in bad faith withheld from defendants a certificate to that effect provided for by the contract, or if the certificate was withheld on account of gross mistake on the part of the superintendent, or failure on his part to exercise an honest judgment upon the question of the sufficiency of the apparatus, then the defendants would be entitled to recover the balance of the contract price, although the certificate is not produced.

6. SAME—HOW PLAINTIFF AFFECTED BY RECOVERY OF COUNTER-CLAIM.

When, pending the trial of a cause, the plaintiff, by whom alone the suit was commenced, amends his pleadings so as to admit a co-plaintiff, so that a recovery of damages is sought in favor of them both, in the event of a verdict against them the recovery upon the defendants' counter-claim will go against both the plaintiffs.

At Law.

Finches, Lynde & Miller and James G. Jenkins, for plaintiffs.

Cotzhausen, Sylvester, Scheiber & Jones, for defendants.

DYER, J., (*charging jury*.) It appears from the pleadings and evidence in this cause that in 1882, in accordance with certain plans and specifications prepared by E. Townsend Mix & Co., as architects and superintendents of the work, the plaintiff Mack constructed for business purposes a certain five-story brick building, situated on the south-west corner of East Water and Wisconsin streets, in this city. In July, 1882, the architects prepared specifications for a steam heating and ventilating apparatus to be provided for the building, and invited proposals for supplying the building with such apparatus. In response thereto, the defendants made proposals by which they proposed to put into the building two of the Walker & Pratt Manufacturing Company's No. 3 safety sectional boilers, one to contain 28 sections and the other 20 sections, both to be complete with all trimmings, castings, fire tools, etc., and to be properly and substantially set in masonry, and to be connected with the proper sized pipes and fittings to radiators and stacks of indirect radiation, as specified in the proposals with reference to the different stories in the building. They declared that it was the intention of their proposals and specifications to include all necessary carpenter and tin work, (not already contracted for;) also galvanized iron at base of radiators, to prevent the cold air flowing across the floor as it is admitted at the windows;

also all necessary mason-work, the mechanical device for regulating cold-air inlet, the registers required for indirect stacks, and whatever should be necessary to constitute a first-class steam-heating apparatus. The defendants also, by these proposals, guarantied to heat the building to a temperature of 70 degrees Fahrenheit, in any winter weather, with a consumption of not more than 175 tons of coal, if the boilers were properly fired, and proposed to put in the apparatus, under the supervision and subject to the approval of the architects and superintendents, in the best and most workmanlike manner; the entire work to be done and the apparatus furnished for \$8,400. It appears that these proposals were accepted, and on the twenty-eighth day of July, 1882, the parties entered into a contract by which the defendants agreed to build, finish, and complete in a careful, skillful, and workmanlike manner, to the full and complete satisfaction of Mix & Co., architects and superintendents, and by and at the times mentioned in the specifications, a complete low-pressure steam-heating and ventilating apparatus, to be furnished and set up in full working order, perfect in all its parts, in said building, so as to fully carry out the design of the work as set forth in the specifications, and the plans and drawings therein referred to. The specifications and the plans of the building were made part of the contract. In consideration that the defendants should furnish all materials, and fully and faithfully execute the work, so as to fully carry out the design thereof as set forth in the specifications, and according to the true spirit, meaning, and intent of the same, and to the full and complete satisfaction of the architects and superintendents, the plaintiff Mack agreed to pay to the defendants therefor the sum of \$8,400, in installments, as follows: In the language of the contract, "as the work progresses to *approval of superintendent*, he will, from time to time, certify payments to said party of the second part, on account of work and materials furnished under contract, not exceeding sixty per centum upon said work and materials so furnished in building, until the job has been perfectly tested as to its performance, as to execution, and also as to workmanship and economy of fuel, to full satisfaction of superintendent of work. And upon completion of job and fulfillment of guaranties, payments will be made to party of first part of balance due; provided the said superintendent shall certify in writing said party of first part is entitled thereto." I have not recapitulated all the details of the specifications and proposals, nor all the provisions of the contract, but only the substance of such parts as seem most material to the issue.

It appears by undisputed evidence that after the making of the contract, and in the fall of 1882 and winter of 1882-83, the defendants proceeded to put into the building two Walker & Pratt boilers, one containing 28 and the other 20 sections, and in connection therewith the steam-heating and ventilating apparatus, concerning which this controversy has arisen. It is alleged by the plaintiffs that this

apparatus, including the boilers, did not, in certain essential respects, meet the requirements of the contract, and this is a suit on the part of the plaintiffs to recover damages which they claim to have sustained on account of the alleged failure of the defendants to place in the building such a heating and ventilating apparatus as the contract provided for and required. The defendants, in reply, maintain that they fully performed the contract; that they furnished such an apparatus as they obligated themselves to furnish, and that the plaintiffs have no valid claim against them for damages; and further, on their part, by way of counter-claim, seek to recover the unpaid balance of the contract price for the apparatus, and also a balance alleged to be due them for extra work done and materials furnished.

The first question for your consideration is, are the defendants liable in damages to the plaintiffs? and that involves the question whether or not the defendants fulfilled the contract by furnishing and placing in the building such a steam-heating and ventilating apparatus as it was their duty under the contract to furnish and place in the building, and by doing the work incident thereto in a proper and workmanlike manner. It is alleged by the plaintiffs that the contract was not fulfilled by the defendants in the following particulars: That the apparatus as placed in the building was insufficient to heat it to a temperature of 70 degrees Fahrenheit in winter weather; that it was insufficient to thus heat the building in any winter weather with a consumption of not more than 175 tons of coal in a season of eight months; and that it was not placed in the building in complete condition, and in a skillful and workmanlike manner.

The contract between the parties speaks for itself, and its purpose and meaning are apparent on its face. There is no difficulty in understanding it. When the defendants entered into the contract they must be presumed to have known the situation and exposure of the building, and also all such details relating to the form and character of its construction as were disclosed by the plans, for the plans were made part of the contract. It must be presumed that they had knowledge of everything pertaining to the interior arrangement and architectural design of the structure, which was shown by the plans, and that with this knowledge they deliberately entered into the contract. Having made the contract, it was incumbent upon them to fulfill its provisions with fidelity, and to perform its guaranties to the full extent which their terms and spirit required, and if, through any fault, neglect, or omission on their part they have failed to meet the requirements of their undertaking, they are answerable to the plaintiffs in damages, for this was the obligation they assumed, and this the responsibility they incurred. But if they have performed their contract and have furnished to the plaintiffs what they agreed to furnish, then they are not so liable.

Recurring to the contract, let us observe again the specific duties which it imposed on the defendants. In the first place, they were to

build, finish, and complete, in a careful, skillful, and workmanlike manner, a complete low-pressure steam-heating and ventilating apparatus, to be furnished and set up in full working order, perfect in all its parts, in the building, so as to fully carry out the design of the work as set forth in the specifications and the plans and drawings of the structure. The building was to be divided into numerous apartments, which were to be arranged and constructed for occupation, and it was evidently the intent of the parties that this should be a complete, and, with proper management, a successfully working apparatus, so that on its completion it would properly heat the building. There were to be two sectional boilers of a certain manufacture, which were to be complete, with all trimmings, castings, fire tools, etc. These boilers were to be connected with pipes of the proper size, and fittings to radiators and stacks of indirect radiation, throughout the different stories. All mechanical devices for making the apparatus operative for the purposes of heating and ventilation were to be furnished and applied, together with whatever should be necessary to constitute a first-class heating apparatus. These specifications and provisions of the contract are plain, and need no interpretation from the court. Then we come to the guaranty, which is made a vital feature of this controversy. The defendants guarantied that this apparatus would heat the building to a temperature of 70 degrees Fahrenheit, in any winter weather, with a consumption of not more than 175 tons of coal in each season of eight months, if the boilers were properly fired. This is a guaranty of the capacity of the apparatus; that is, that as it should be put up and established in the building by the defendants, it would heat the building to the specified degree of temperature in any winter weather; and this means the building as it was situated, and with its exposure, and according to its structural arrangement and design, as shown by the plans. It means, also, that if necessary it would heat the entire building to the specified degree of temperature, and that the consumption of coal should not exceed the specified amount per season. But the guaranty also means that the apparatus would do this work if it was properly managed. Of course, the defendants are not to be understood as warranting that the apparatus would meet the requirements named, under negligent or incompetent management; and here I instruct you that if this apparatus failed to heat the building, or any part of it, to the required degree of temperature, because of careless or unskillful or incompetent management on the part of any employe of the plaintiffs to whom its care and charge were intrusted, and if it would have met the requirements of the guaranty under proper care and competent management, the plaintiffs, and not the defendants, are answerable for such failure. The defendants, as I have said, are to be held to a faithful performance of their contract, and if in fact they did perform, by putting into the building a complete apparatus, capable, under proper care and competent management, of doing the

required work, then they ought not to be held accountable for any failure of the apparatus, resulting from negligence or unskillfulness or incompetency in its management by the plaintiff's employees. In this connection I give you the eighth instruction asked by defendants, as follows:

"In regard to the sufficiency of this steam-heating apparatus, the contract between the parties provides that the same must be adequate to heat the building to a temperature of 70 degrees Fahrenheit, in any winter weather, with a consumption of not more than 175 tons of coal, 'if the boilers are properly fired.' And if the jury find from the evidence that said boilers were not properly fired while the plaintiffs had charge of the heating, then the failure of the apparatus to conform in these particulars cannot be assigned as a breach of the contract."

I do not say or intimate what was the fact in relation to the firing of the boilers or the management of the apparatus; that is a question which it is your exclusive province to pass upon. As I have indicated, if this apparatus, as put into the building by the defendants, did not meet the requirements of the guaranty, the defendants cannot be relieved from their obligation by claiming that the building was so situated as to be peculiarly exposed to the winds of winter, or that it has an unusual extension of glass surface, for they contracted with reference to that state of facts. And in regard to workmanship and materials used in the construction of the building, externally and internally, for the purpose of protection against cold, I instruct you that the defendants contracted with reference to such quality of workmanship and materials as ordinarily enters into and as would ordinarily and naturally be expected to be placed in buildings of the class and character of this building. If first-class workmanship and materials are ordinarily put into such buildings, then the defendants had the right to expect that such workmanship and materials would be put into this building. The defendants did not contract against mechanical defects or deficiencies in construction which ought not to have existed, if any such did, in fact, exist. A good deal of testimony has been produced in relation to the construction of windows in the building. The defendants had the right to expect, when they made their guaranty, that the windows and window-frames and casings would be so constructed and adjusted as to afford such security against the external atmosphere as is ordinarily provided, and as it would be naturally expected the builders would provide in such a building. The defendants did not guaranty to protect the inmates of the building against exposure to cold arising from mechanical defects in the windows which ought not to have existed in such a structure, if any such defects did, in fact, exist. The meaning of their guaranty is that the apparatus would heat the building to a temperature of 70 degrees Fahrenheit, in any winter weather, with the windows constructed and adjusted as it would be ordinarily expected they would be constructed and adjusted in such a building. In other words, as is stated in one of the instructions asked by the defendants:

"If the jury find from the evidence that, as now claimed by the defendants, sufficient heat was produced and generated to heat the building to the required temperature, but that the same could not at all times be retained in some of the rooms on account of defects in the construction, not manifest from the original plans and specifications, and beyond the control of these defendants, then such occasional insufficient heating thus caused cannot be properly laid to their charge."

Whether there were such defects in the construction of the building as is claimed by the defendants, is a question of fact for you alone to determine; and whether, if there were defects, the alleged insufficient heating of the rooms, or any of them, was attributable to such defects, is also a question for your sole consideration.

As to rooms containing grates or fire-places and ventilating shafts, if the proposed arrangement and construction of the rooms were shown on the plans, then the defendants must be held to have contracted with such arrangement and construction in view. In this connection, with slight change, I give you the eleventh instruction asked by the defendants:

"If the jury find from the evidence that subsequent to the signing of the contract changes and alterations were made by order of the architects, either in the building or heating apparatus, that interfered materially with the carrying out of the original contract in heating said block, then such changes were at the risk of the owners; and for insufficiency of the apparatus in any particular, growing out of such alterations so made, the defendants would not be responsible."

As to the chimney in the building, about which testimony has been given, I have only to say to you that if the plans of the building showed what were to be the size, height, form, and capacity of the chimney, and the construction and arrangement of its flues, and the defendants could ascertain the same by inspection of the plans and drawings, and if, subsequently, there was no agreement to change the size and capacity of the chimney or flues, then they must be held to have made their contract with reference to such plans. If the plans were ambiguous in that particular, or did not specify details in the construction of the chimney, so as to enable the defendants to know what kind of chimney was to be constructed, then they had a right to suppose and expect that a sufficient and properly constructed chimney would be erected, with properly arranged flues, so as to permit the efficient operation of such a steam-heating apparatus as they proposed to put into the building. If, during the progress of the work, the defendants were advised of the proposed form and construction of the chimney, and requested certain changes to be made, and such changes were accordingly made, and they afterwards placed the apparatus in the building, then they cannot complain of such changes as tending to render the work of the apparatus inefficient. Further, in the language of one of the instructions asked, "if the jury find from the evidence that subsequent to the signing of the contract it was promised and agreed to enlarge the size of the chimney beyond

what the original plans showed it to be, and that such promise and agreement were not faithfully carried out, then, and in such case, occasional defects in the working of said steam-heating apparatus, caused by the failure to enlarge the size of the chimney, are not chargeable to the defendants in this case."

Now, gentlemen, I think I have said to you all that I am required to say in considering the plaintiffs' case concerning the rights, duties, and obligations of the parties under this contract. Counsel, in argument, have stated to you with clearness the points of difference between the parties and the respective claims they make. I shall not travel over the field of facts covered by the evidence. Upon the proofs so fully laid before you, you must determine whether the defendants failed to perform their contract as contended by the plaintiffs, or whether in fact they fulfilled its requirements, as they insist they did.

[The court here stated to the jury the respective claims of the parties upon this branch of the case.]

In establishing their case, it is incumbent upon the plaintiffs to satisfy you by the evidence that the apparatus did not fulfill the requirements of the guaranty; and in determining this question you have a right to consider, among other things, whether a fair and sufficient test of the heating capacity of the apparatus was or was not made before the plaintiffs called on the defendants to remedy the alleged deficiencies therein. If, under proper management and proper firing of the boilers, the apparatus in question was inadequate to heat this building, constructed according to the plans and specifications, to a temperature of 70 degrees Fahrenheit, in any winter weather, with a consumption of 175 tons of coal in a season of eight months, and if such failure to so heat the building was not attributable to such defects or changes in the construction of the building, if any, as I have instructed you the defendants did not contract to provide against, and were not answerable for, then the plaintiffs are entitled to an allowance of damages in their favor. If, on the contrary, under competent management and proper firing of the boilers, the apparatus was adequate to heat the building constructed according to the plans and specifications, and in such a workmanlike manner as I have said to you the defendants had a right to expect it would be constructed, to the specified degree of temperature with the specified consumption of coal per season, then the plaintiffs are not entitled to recover damages against the defendants. So, too, if the apparatus had the necessary heating capacity to do the required work, but failed to heat the building to the extent required by the contract, and such failure was solely occasioned by incompetent management of the apparatus or firing of the boilers by the plaintiff's employes, or by such defects or changes, if any, in the construction of the building as I have said the plaintiffs were alone responsible for, or by either of those alleged causes, or all of them combined, then the plaintiffs are not entitled to recover.

If you find the plaintiffs entitled to recover, the next question is, what damages is it permissible to award them? Upon that subject I instruct you that the measure of the plaintiffs' damages, if the defendants have broken their contract, is the difference between the value of the apparatus in its alleged defective condition and what its value would have been if it had met the requirements of the contract. This latter sum—that is, the value of the apparatus if it had been such as the contract called for—may be more than the contract price or it may be less, but it is obviously the proper standard by which to measure the plaintiffs' damages, because such an apparatus was exactly what the plaintiffs were entitled to, and then the contractor obtains, also, just what his defective work is worth. *White v. Brockway*, 40 Mich. 209; 2 Suth. Dam. 482. So, gentlemen, if you come to this question in the case, you will determine from the evidence what was the value of this apparatus in its alleged defective condition; then, what would have been the value of the apparatus if it had fulfilled the conditions of the contract; and the difference between those values would be the plaintiffs' damages. Then, having thus ascertained the amount of such damages, you will allow to the defendants or give them credit for the amount still unpaid them on account of the apparatus, such amount being ascertained on the basis of the value of the apparatus. To illustrate,—and you will understand what I now say as wholly illustration, and not as any intimation of any opinion of the court upon the facts of the case,—suppose you find the contract broken; then suppose you find the value of such an apparatus as the contract called for to have been \$15,000, and the value of the apparatus in its alleged defective condition to have been \$8,400,—then the difference between these two sums, which is \$6,600, would be the plaintiffs' damages. Then, deducting from the \$6,600 what remains unpaid to the defendants, which is \$5,900, the balance would be \$700, and that would be the amount of the verdict in favor of the plaintiffs. Again, to illustrate, suppose you should find the value of such an apparatus as the contract called for to have been \$10,000, and the value of the apparatus actually put into the building to have been \$8,400, then the difference between those two sums, which is \$1,600, would be the plaintiffs' damages. In such case you would apply this \$1,600 on the \$5,900 unpaid to the defendants, thereby reducing that sum to \$4,300, and your verdict would then be for the defendants for \$4,300. In other words, having ascertained the difference between the value of the apparatus actually furnished, and the value of the apparatus if it had done the work stipulated for in the contract, you will then allow the defendants what is unpaid to them, ascertained on the basis of the value of the apparatus they furnished, and then render a verdict either for the plaintiffs or defendants, as the final result of such an ascertainment may make necessary.

If you find that the defendants did not perform their contract,

and therefore that the plaintiffs are entitled to an allowance of damages,—which is the branch of the case we have been thus far considering,—then there will be nothing to consider in relation to the defendant's counter-claim for the balance of the contract price. But suppose your determination should be that the defendants have duly performed the contract; that there was no breach on their part, and therefore that the plaintiffs are not entitled to damages,—the question then arises, what are the rights of the parties with reference to the balance of the unpaid contract price—\$5,900— which the defendants seek to recover on their counter-claim? and this is the next question for consideration.

Ordinarily, upon its being determined that there has been no breach of a contract, it follows as a consequence that the parties to whom anything is due on the contract are entitled to recover the amount thus due. In the contract in question it was specially provided that upon completion of the work to the satisfaction of the superintendent, and fulfillment of guaranties, the defendants should receive payment of the balance due upon the contract, provided the said superintendent should certify in writing that the defendants were entitled thereto. By this provision it was made a condition precedent to the right of the defendants to payment of the balance of the contract price on completion of the work, to obtain the certificate of the superintendent in writing that they were entitled to such unpaid balance. No such certificate has been obtained by the defendants from the superintendent, and it is understood as a fact in the case that the superintendent has refused to make the certificate.

* * * * *

It follows, therefore, that even though you should be of the opinion that the defendants have performed their contract by putting into this building such an apparatus as their guaranty required, still they are not entitled to recover the balance of the contract price unless the non-production of the certificate of the superintendent can be avoided or excused. This state of the case results from the fact that the parties chose to make a contract by which the architect or superintendent was made the judge between the parties of the completeness and sufficiency of the work, and by which the right of the defendants to payment of the final balance of the contract price was made dependent upon the execution by the superintendent of a certificate that they were entitled thereto. The court cannot change the contract which the parties made, or make a new contract for them. But, though the non-production of the superintendent's certificate, if not in some legal manner excused, prevents a recovery by the defendants of the balance of the contract price, it ceases to be a bar to such recovery when such facts are shown as in the law excuse or avoid its non-production; and I now proceed to state to you what it is necessary for the defendants to establish to bring about that result.

If the fact be that the apparatus which the defendants put into the plaintiffs' building in all substantial and material respects fulfilled the requirements of the contract, and the architect or superintendent fraudulently, or in bad faith, refused to give to the defendants the certificate provided for by the contract; or if the certificate was withheld in consequence of gross mistake of the superintendent, or failure on his part to exercise an honest judgment on the question of the sufficiency of the apparatus,—then the defendants would be entitled to recover the balance of the contract price, although the certificate is not produced. What was contemplated by the contract was that, after the apparatus was put in operation in the building, the superintendent, with full knowledge of all such facts as would enable him to exercise his judgment in the matter, should in good faith, and upon his best judgment, decide for the parties whether the apparatus met the requirements of the guaranty, and whether, therefore, the defendants were entitled to the balance of the contract price remaining unpaid. If he so exercised his honest judgment, then his decision against the right of the defendants to a certificate cannot be questioned here on the ground merely that he committed an error of judgment. What the law exacts from an arbiter thus chosen, is an understanding of the facts upon which he is to exercise his judgment, and good faith. For example, if an architect or superintendent to whom such a power had been delegated, in the face of a manifest performance of a contract,—a performance with which he ought in right and justice to be satisfied,—were to perversely, wrongfully, and unjustly refuse to give the required certificate, that would be evidence of bad faith; and in such case, it appearing that the refusal to give the certificate was not the result of the exercise of a candid and honest judgment, there would be no doubt of the right of the party to recover what might be due him on the contract, notwithstanding he had not received a certificate. Really the question in a case like this is, has the superintendent exercised the authority given him to determine whether the party has performed his agreement and is entitled to payment, with an honest purpose to carry out the real intention of the parties as collected from their agreement? And, as tending to establish bad faith, it is competent to show that the person to whom the power was given to make the required certificate, perversely, wrongfully, and unjustly withheld the certificate; that he was actuated by ill-will, prejudice, partiality, caprice, or motives inconsistent with an intent to exercise his honest judgment of the sufficiency of the work. But, as I have said, if the case is one where the superintendent honestly exercises his judgment upon the question, mere error in his conclusions will not avoid the non-production of the certificate; nor is such error of judgment sufficient to show fraud or bad faith or mistake. The mistake that will avoid the production of the superintendent's certificate must be gross. It must be a mistake in some matter of fact by which he is led to a false result. It must be

more than a merely erroneous conclusion arrived at on consideration of all the facts. One test of such a mistake is that it is of such a kind, and so obvious, that when brought to the notice of the arbitrator who is to decide the question, it would induce him to alter the result to which he had come in the particular specified. It must be a mistake as to a fact upon which the judgment of the superintendent or arbitrator has not passed as a part of his investigation, and of such a nature, and so proved, as to lead to a reasonable belief that he was misled and deceived by it, and that if he had known the truth he would have come to a different result. *Boston Water-power Co. v. Gray*, 6 Metc. 131. In the language of one of the decisions cited on the argument, the mistake, to be available in such a case, must be one which shows clearly that the superintendent was misled, deluded, or so far misapprehended the facts that he did not exercise his real judgment in the case. *McAuley v. Carter*, 22 Ill. 57.

* * * * *

Considering all the testimony bearing on the subject, with the suggestions in relation thereto which have been urged by counsel, you will determine whether the non-production of the certificate is avoided or excused. If it is, and if the contract was fully performed, then the defendants are entitled to recover on their counter-claim for the unpaid balance of the contract price. If the production of the certificate is not avoided or excused, then the defendants are not entitled to recover on that counter-claim, notwithstanding you may think that the apparatus satisfied the requirements of the guaranty.

* * * * *

Pending the trial, the plaintiff Mack, by whom alone this suit was originally commenced, has amended his pleadings by making one Alexander Guiterman a co-plaintiff, and so a recovery of damages is sought in favor of both plaintiffs. This being so, if you find that the plaintiffs are not entitled to recover, and that the defendants are, your verdict will go against both the plaintiffs.

In re MERRILL and others, Bankrupts.

(District Court, N. D. New York. 1884.)

BANKRUPTCY—PROMISSORY NOTE—INDORSER—PART PAYMENT—NOTE FOR BALANCE—PETITION IN BANKRUPTCY.

The principle that the taking of a promissory note does not extinguish the original debt except by express agreement, has little application to a case where the parties sought to be charged are not makers but indorsers, and when, prior to the date of the second note, (given for balance after part payment of the first,) their legal *status* is completely changed by the filing of a petition in bankruptcy.

Prior to the filing of the petition the bankrupts were charged as indorsers on a note for \$1,500, made by one Gaylord. After the filing of the petition, the claimant, who was the holder of the note, received a payment of \$500 thereon and a new note similarly indorsed for the balance, \$1,000. The register found that this transaction was a payment of the \$1,500 note which was thereupon given up. The claimant first proved the \$1,000 note but subsequently offered to surrender it to the assignee and filed a supplemental proof for the balance alleged to be due on the original \$1,500 note. The register found that the \$1,000 note was provable because made and delivered before the actual adjudication in bankruptcy. The question now comes before the court upon exceptions filed by both parties to the report.

Richard C. Steele, for claimant.

Charles F. Durston, for assignee.

COXE, J. The original and supplemental proof should be expunged. The former, for the reason that the note upon which it is founded was made and delivered after the filing of the petition in bankruptcy; the latter, upon the authority of *In re Montgomery*, 3 N. B. R. 426.

The cases cited by the counsel for the claimant, holding that the taking of a promissory note, does not extinguish the original debt unless by express agreement, have, I think, but little application to a case where the parties sought to be charged are not makers but indorsers, and where, prior to the date of the second note, their legal status is completely changed by the filing of a petition in bankruptcy.

In re PEVEAR and another, Bankrupts.

(*District Court, N. D. New York. 1884.*)

BANKRUPTCY—FRAUD—ALLEGED RETAINING OF MONEY AND EFFECTS BY BANKRUPT.

In a proceeding against a bankrupt by his assignee for an alleged retaining of money and effects, fraud being charged and a summary remedy demanded, the court should be clearly satisfied that the accusations of the petition are sustained by the proof.

In September, 1880, the assignees of the above-named bankrupts presented to the court a petition representing that the bankrupts had fraudulently concealed and withheld from them \$10,500 in money, besides a large amount of merchandise. The petitioner's prayer is for an order directing the bankrupt to pay over said sum and return said merchandise. The court thereupon made an order referring it to the register in charge to take proof of the allegations of the petition and report the same to the court with his conclusions

thereon. On the fifteenth of May, 1884, the register made his report, in which he found that no money belonging to the assignees has been withheld by the bankrupts or either of them. The case is now before the court on exceptions filed to the said report.

Henry M. Field, for assignees.

Daniel L. Benton, for bankrupts.

COXE, J. It cannot be said, upon the evidence submitted, that the register has reached an incorrect conclusion. In a proceeding of this nature, where fraud is charged and a summary remedy demanded, the court should be clearly satisfied that the accusations of the petition are sustained by the proof. The evidence is not of this convincing character. It is contradictory, conjectural, and replete with inaccuracies. It cannot be said that fraud on the part of the bankrupts has been so clearly established that the court would be justified in making the order asked for in the petition.

I do not think that the findings of the register should be disturbed. Exceptions overruled.

ALLEN *v.* DEACON.

(Circuit Court, D. California. July 28, 1884.)

PATENT—UNSTAMPED ARTICLE—INNOCENT INFRINGER—SECTION 4900, REV. ST.

In the case of a patented article which does not bear the required stamp or label, recovery shall not be had upon infringements occurring while the infringer is ignorant of the patent, under the conditions stated in section 4900, Rev. St., but shall be limited to infringements arising after notice.

In Equity.

W. H. Sharp, for complainant.

John C. Hall, for defendant.

SAWYER, J. The defendant had been employing the patented article in steam-engine condensers manufactured by him for several years prior to 1875, in entire ignorance of the existence of the patent sued on. The patentee did not affix the word "patented" to the article manufactured by him, or to a label attached, or in any other way indicate that it was patented. Several engines in steamers came into the port of San Francisco, having the article manufactured and sold, by authority of the patentee, in their condensers, without any indication that it was patented, and the defendant had often examined them. He was entirely ignorant that there was a patent upon it till the month of June, 1875. While building the condensers of the *Constantine*, at that time, after he had got the larger part of the patented packing in, he was notified that there was a patent upon it. This was the first information he had of the patent. He at once of

ferred to pay the royalty for that already used in the condensers of the Constantine, and for enough to finish them; but the proprietor of the patent refused to accept such payment unless he would pay the royalty on all he had used during the preceding years while he was ignorant of the patent. He thereupon finished the condensers already well advanced towards completion, but he has in no other way infringed the patent since he had notice. This defense was set up in the answer, and established by the evidence. It is therefore available as a defense. *Rubber Co. v. Goodyear*, 9 Wall. 801. The master only made an allowance for the infringement by use of the patented article in the condensers of the Constantine, in accordance with the provisions of section 4900, Rev. St., that "in any suit for infringement by the party failing so to mark, (as before provided in the section,) no damage shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement, and continued after such notice to make, use, or vend the article patented." The complainant excepts to the master's report on this ground, and insists that damages and profits should have been allowed for all prior infringements. The complainant insists that, when the defendant continues to infringe after notice, he is not limited in his recovery under the statute to the damages and profits accrued from the infringement subsequent to the notice, but claims that, if the defendant continues to infringe after notice, he is entitled to recover all the profits and damages resulting from the infringement, from the beginning of the infringement. I am unable to take this view. No case has been brought to my notice in which this precise point has been decided. I think, however, the fair construction of the provision of the statute is that the recovery shall not be had upon infringements occurring while the infringer is ignorant of the patent under the conditions stated in the statute, but shall be limited to the infringements arising after notice. If mistaken in this, I do not think the infringement after notice in question is of such a willful nature as to incur the penalty of a recovery for all prior infringements without notice of the patent. Immediately upon receiving notice, before completing the machine already far advanced in construction, defendant offered to pay the full royalty established, for the whole machine, and plaintiff refused to accept it without payment for all prior infringements. It was his own fault that he did not receive compensation for the liability that accrued under the statute after notice.

I think complainant entitled to costs. Although there was a general offer to pay the royalty, which complainant refused to accept, there was no actual tender of any specific sum of money, and no tender kept good and brought into court, such as would be required in an action at law to relieve a party from costs. Besides, the answer raised other issues which the complainant was required to contest.

The exceptions to the master's report are overruled, and the report confirmed.

Let a final decree be entered in favor of the complainant for the amount found by the master, with costs.

SESSIONS v. ROMADKA and others.

Circuit Court, E. D. Wisconsin. July 26, 1884.

1. PATENT LAW—IMPROVEMENTS IN TRUNKS—TAYLOR'S INVENTION.

Examination of Taylor's patent for improvement in trunks—alleged to have been infringed—and comparisons made with patents of others in the same line, and defendants adjudged to be infringers.

2. SAME—SEPARATE INVENTIONS UNCONNECTED CANNOT BE EMBRACED UNDER ONE PATENT.

A patent is not valid which is for several distinct and separate inventions not connected in design or operation. The question whether the requisite connection exists among such is often a perplexing one, however, and must be left largely within the discretion of the head of the patent office.

3. SAME—DISCLAIMER—TAYLOR PATENT.

It being extremely doubtful whether the Taylor patent is not obnoxious to the objection that it is for several distinct inventions a disclaimer of all claims in the patent, except that in controversy, duly filed in the patent office, is required as a condition to granting the relief prayed in the bill.

4. SAME—OMISSION OF STAMPED WORD "PATENTED."

When a patented article is so small that it is difficult to stamp upon it the word "patented," with the date of the patent, the requisite is answered by such a stamp or label being placed upon the packages in which the articles are shipped.

In Equity.

Mitchell & Hungerford, B. F. Thurston, and Joshua Stark, for complainant.

Jenkins, Winkler & Smith and Geo. W. Hey, for defendants.

DYER, J. On the ninth day of July, 1872, Charles Asa Taylor obtained letters patent No. 123,925, for an improvement in trunks. The specification states that the invention—

"Consists in a yielding roller of novel construction, to be applied entirely on the outside of the trunk; in spring catches to hold the trunk shut; in a brace of peculiar construction to be applied to the outside of the body, for the purpose of holding up the top or lid; and in a spring arm for supporting the tray when it is turned up."

As descriptive of so much of the invention as relates to the spring catches, there is a further statement in the specification as follows:

"Instead of providing the top of the trunk with the usual straps for fastening it down, I attach to its front two spring catches, I, and to the top two tangs or plates, J, which lock into and are held by the catches. Each catch consists of a metal socket, e, provided with a hinged latch or hook, f, and with a flat spring, g, which bears against the lower end of the latch and keeps its upper end pressed inward against the socket. The upper end of the latch

or hook is provided with a prong, *t*, which extends through into the socket, as shown in figure 4, the upper side of the prong being beveled off as shown. The tangs on the top or lid are provided with beveled ends and with holes or openings as shown. When the top is pressed down the tangs slide down into the socket, and the prongs, *t*, of the latches lock through them, in the manner shown in figure 4, so as to hold the top or lid down securely. In order to unlock latches, it is only necessary to turn back the upper ends of the hooks or latches so as to draw the prongs out of the tangs. After the latches are turned back a certain distance, the springs hold them in position, as shown in figure I, and in dotted lines in figure 4, so that it is only necessary to attend to one of them at a time."

The patentee's claims are as follows:

"(1) The yielding roller for trunks, consisting of the socket having the flat spring mounted therein and provided with the roller in its end, when constructed and arranged as described, so that it may be applied entirely to the outside of a trunk, as set forth. (2) The offset slotted plate, *L*, applied to the outside of the body, in combination with the locking brace, *N*, pivoted to the top, and arranged to fold down inside of the plate, as described. (3) The spring catches, *I*, constructed and applied to the front of the body, as described, in combination with the tongues or latches, *J*, on the top, when arranged to operate as set forth. (4) The spring arm, *P*, secured to the end of the body, in combination with the plate or catch, *Q*, on the tray, when arranged as described, for the purpose of holding the tray up."

The defendants are charged with infringing the third claim of this patent, and the present bill is filed by the complainant, as assignee of the patent, to restrain such infringement. Infringement is denied, and it is alleged, as a further defense, that the trunk latch described in the third claim was old and well known in public use before the patent to Taylor was issued; that it was described in letters patent issued to the following-named persons at the dates following, viz.: to E. A. G. Roulstone, dated October 30, 1866, No. 59,272; to Edward Semple, dated February 18, 1868, No. 74,723; to John C. Locke, dated March 21, 1871, No. 112,937; to C. N. Cutter, dated October 20, 1868, No. 83,137; to Louis Hillebrand, dated March 16, 1869, No. 87,931; to E. L. Gaylord, dated January 29, 1861, No. 31,233; to Louis Ransom, dated October 13, 1868, No. 82,988; to A. M. Olds, dated June 25, 1867, No. 66,103; and to Chandler Seaver, Jr., dated April 4, 1865, No. 47,135,—all of which letters patent are introduced as either anticipating the Taylor invention described in the third claim, or as showing the state of the art at the time of such invention.

If the complainant's patent is shown to be valid, then I think there can be little doubt that the defendants infringe the third claim. Evidently the term "spring catches," described in the specification and claim, refers to all of that part of the fastener which is secured to the body of the trunk. This part consists of three pieces, namely, a case provided with a metallic socket, a hinged latch hung in the socket, and a spring. The socket is formed by an opening in the top of the case. The latch is hung upon a horizontal axis in the case, and its upper end is provided with a part for a finger-piece which is

without the case, and with a beveled projection or hook, which, when the latch is closed, is within the case, and enters the space into which the tongue or hasp, J, referred to in the third claim, descends when the cover of the trunk is shut down. The latch and spring are so combined with each other that when the latch is in one position the spring will hold the hook of the latch in position for engagement with the tang, J, and, when the latch is thrown backward a certain distance, the same spring will hold it out of engagement. The other part of the fastener consists of a simple plate which is secured to the trunk cover, from which plate there projects downward a rigid tang, provided with an opening for the hook of the latch to enter. The lower end of this tang is beveled off on its side edges, so that when it engages with the mouth of the socket it will cause the cover to come down into proper position for engagement with the spring catch, and when down to act in connection with the socket as a dowel. This is substantially the description of the device given by the expert Shepard in his testimony, and I think it accurate.

In *Cowell v. Sessions*, 17 FED. REP. 452, Judge SHIPMAN described the Taylor fastener as "a combination of dowel or keeper upon the trunk cover and socket upon the trunk box, which socket is provided with a hinged non-elastic latch or catch, which is pressed upon by a spring and snaps into firm engagement with the keeper, the hinged latch being acted upon by the spring to hold it either open or shut." This fastener is not a lock, but is designed as a substitute for leather straps, and for use in addition to the ordinary lock, to prevent strain upon the lock and to hold the cover securely, even if the trunk is not locked. It performs the function of a dowel to keep the cover from racking. In use, two of the fasteners are applied to the front of the trunk, one near each end, upon opposite sides of the trunk lock.

The defendants' trunk fastener, like the complainant's, consists of two parts,—one to be applied to the body of the trunk, and the other to the cover. That part which is fastened to the trunk body is composed of three pieces; namely, a case with a metallic socket open at the top for the reception of a tang, a latch hung on a horizontal axis, and a spring. The face of the case is covered by the metal of the case, the latch swings in the plane of the case, the latch-hook lies in the same plane with the latch and interlocks with a corresponding hook on the under side of the tang. A slot in the side of the case permits the latch to be moved to one side to allow the withdrawal of the tang. The tang is tapered to its point, and the spring is of wire secured to a pin in the case. Thus it appears that the defendants' device contains the same number of parts as those described in the Taylor patent. In both the combination is such as to operate substantially in the same way. There are certain differences in design and form. In the Romadka fastener the catch moves sidewise from one side of the case, instead of forward from the front of the case. It contains a bent wire spring instead of a flat one, and the adjustment

of the springs in the two devices is different. The tang in the defendant fastener has no opening for the latch-hook to enter, but, tapering to a point, there is a hook formed on the under side for engagement with the hook in that part of the case which is attached to the body of the trunk. I regard these variations from the construction of the Taylor fastener as mere mechanical changes or equivalents. The experts sworn on the part of the defendants testify that the two combinations are substantially the same.

It is contended that the third claim in the Taylor patent is not for the combination of a case, hinged latch, and double acting spring with a tang; but that, because of the language employed in the claim, the invention must be restricted to the precise structure described, and that there can be no infringement unless the construction specified is followed. But it seems to me that the two devices are not substantially different in the essential elements of organization. The Taylor invention consists of a combination. It is the combination of a dowel organization with a spring-latch system, the latch being so constructed that in use it may be thrown out of connection with the other parts of the device, and this combination is shown in the defendants' fastener. The construction which counsel ask the court to place upon the third claim is extremely narrow. It is not, I think, justified by the state of the art when the patent was granted. It is true that the claim contains the language, "constructed and applied to the front of the body, as described;" and the logic of the defendants' contention is that there can be no infringement unless the construction of the infringing device is exactly similar to that of the Taylor fastener. Such a construction of the claim would be too restricted, in view of the fact that the Taylor combination was new, and that his invention is evidently meritorious. If it seems plain that the defendants have embodied in their device the essential elements of organization contained in the Taylor fastener,—if they have appropriated the results of the inventor's thought, and made a fastener that exhibits in its construction the equivalents of the patented device,—then I think the defendants ought to be held infringers. Comparing the two devices, it seems clear that the differences in construction are but mechanical deviations that serve only to make manifest the appropriation by the defendants of the substance of the Taylor invention.

In the opinion of the court nothing is shown which anticipates the Taylor fastener, nor is such a state of the art proven as establishes a want of novelty in the device when the patent was granted. In *Cowell v. Sessions*, *supra*, the Semple and Locke patents were before Judge SHIPMAN, and I concur in what he says of them. I quote from his opinion:

"The Taylor invention was a trunk fastener, not a lock; but a fastener to keep the lid in place in case of accidents, and to take part of the strain which would otherwise come upon the lock. It is a combination of dowel or keeper

upon the trunk cover and socket upon the trunk box, which socket is provided with a hinged non-elastic latch or catch, which is pressed upon by a spring, and snaps into firm engagement with the keeper, the hinged latch being acted upon by the spring to hold it either open or shut. The Semple invention was not a trunk fastener. It was an angle plate upon the trunk cover, provided with a dowel in combination with an angle plate upon the trunk box, provided with a loop into which the dowel entered. The whole arrangement was for the purpose of stiffening the frame, making the upper corners durable, and preventing lateral motion of the cover. The Locke invention was a strap made of some metal which yields readily, and resting loosely in its cap, so as to have a slight degree of lateral play, and dovetailed at its lower end, which engages with a peculiarly constructed catch upon the body of the trunk. The lower end of the strap rides over the dovetailed lugs of the catch till the cover is closed, when the inclines of the straps and the lugs coincide. While this device is a fastener, it bears no substantial resemblance to the rigid keeper of the Taylor invention, which slides into a socket and engages with a non-elastic hinged latch, actuated by a spring to hold it either open or shut, the latch snapping into firm engagement with the keeper."

The Roulstone patent is for an improvement in traveling bags. It describes, among other things, a spring locking device for holding the two parts of the bag frame together, but this device is not provided with any means for holding the latch out of engagement when desired,—it does not exhibit the dowel in combination with the spring latch,—and I do not see how it could be applied to the front of a trunk body and lid; in its organization it is, as I understand it, wholly unlike the Taylor fastener.

The Cutter patent is for an improvement in locks for trunks, pigons, etc. The device is not intended for use as a catch or fastener like the Taylor invention, but is a lock to be opened by a detachable key. It does not contain a rigid tang, but a pivoted tang, and is not, in its construction, adapted for use on the front of the body of a trunk. At least, such is my reading of the patent and understanding of the device.

The Olds patent is for an improvement in spring hinges, and the Seaver patent is for an improved clothes fastener. Neither of these inventions, in design, construction, or adaptation to use, exhibit any similarity to the Taylor fastener.

The Gaylord patent is for a trunk lock. It is in two parts,—one to be fastened to the trunk cover, and the other to the trunk body. It has a rigid tang which is received into a socket, and as the tang is pressed into the socket it is self-locking. But it can only be unlocked with a key, and the socket is placed upon the front of the lock-plate. It has not a hinged latch for engagement with the tang, nor a latch provided with a finger-piece, nor one which, by the action of a spring, may be held in or out of engagement with the tang by changing its position. As before stated, the parts can only be disengaged by means of a key, and, while it shows some individual elements that are present in the Taylor and in the defendants' fasteners, as a combination it is radically unlike them. It belongs to the lock class, of

which several specimens are in evidence, and I do not regard them as anticipating the Taylor fastener, or as showing such a state of the art as deprives that device, in view of the use for which it is designed, and of its form of construction, of the merit of novelty.

The Ransom patent is for an improvement in trunk clasps, which are intended as substitutes for straps and buckles. The clasp consists of two parts,—one attached to the body of the trunk, the other to the lid. Each of the parts has a central longitudinal slot in which a tongue fits, these slots so coinciding as to form a continuous slot to receive the tongue when the lid is closed. The tongue is pivoted, and a spring presses against its lower end to keep it in position when shut down or when open, acting upon the principle of a spring in an ordinary pocket-knife. The tongue is provided with a thumb-catch to raise it for the purpose of opening the trunk. The principle upon which the tongue with its thumb-catch operates is quite like the hinged latch or hook in the Taylor fastener, but otherwise the two devices are wholly unlike, and the superior utility of the Taylor device is apparent. The Ransom invention is a trunk fastener, but it does not exhibit the elements of the Taylor combination. It does not have the rigid tang acting as a dowel, nor the socket with its catch to receive the tang. The part attached to the lid of the trunk, when the trunk is shut, rests directly upon the part attached to the body of the trunk, and the parts are then united by the insertion of the tongue in the slot, which extends centrally through the parts when thus joined. The socket and dowel features are not present in the device at all.

It was stated on the argument by counsel for the complainant that both the Gaylord and Ransom devices were held by Judge Nixon unavailing to defeat the Taylor patent, in the case of *Sessions v. Ballard*, heard and decided by him. I have been unable to verify the statement by any published report of that case, but I did not understand it to be controverted by counsel for the defendants.

The Hillebrand patent of 1869 is for an improvement in trunk locks. Upon a careful examination of the specifications and drawings of this patent I quite agree with the statements of the complainant's expert, that this device does not exhibit a combination of the dowel and spring-latch features of the Taylor fastener, nor the latch having a part accessible for operation from the exterior of the case, nor a lock which is adapted for use upon the front of a trunk body in connection with a rigid hasp or tang upon the trunk cover. If I correctly understand the specifications, they describe a lock adapted for use with a loose hasp, the staple of which enters an aperture in one of the broad sides of the case, with a projecting arm on one side of the lock-bolt which passes through the hasp. The lock is operated with a key. The claim of the patent is "a single spring so set that one of its ends bears solidly against a point of the bolt so as to throw the bolt backward and forward after being started by the key, substantially as and for the purpose set forth."

There is an exhibit in evidence in the case, marked "Exhibit Hillebrand," which is a sample of a metallic trunk fastener, and which bears the stamp "Pat'd Mar. 1869," the date of the Hillebrand patent just referred to. It is somewhat similar in form to the Taylor fastener, and in construction to the defendants' device. It cannot be accepted as a model of the Hillebrand lock, so radically different is it in construction from the lock described in the patent. And the proofs do not show that its construction or use antedates the Taylor patent.

Another patent, No. 120,067, dated October 17, 1871, and issued to Hillebrand and Wolf, was, by special leave of the court, introduced in evidence at the hearing. It is a patent for an improvement in trunk-lid guides, and the lock introduced in evidence before the examiner, labeled Exhibit 6, seems to conform in part to the construction described in the specifications of this patent. This lock is stamped "Pat'd Mar. '69 and Oct. '71;" so that it would seem to be a lock claimed to have been made under the two Hillebrand patents. The drawing and specifications in the patent of 1871 describe a hingeless hasp secured to the lid of the trunk and provided with a catch for engagement with the lock-bolt. A handle is formed in the body of the hasp by which the trunk-lid may be conveniently raised. Within the walls of the casing of the lock, at the upper side, are sockets for the entrance of lugs which are attached to the hasp, so that when the trunk is locked the lugs are inclosed within the lock-casing. These lugs are intended to relieve the catch of the hasp and the lock-bolt of side strain, and to distribute this strain over the lugs and sockets. The patentee's claim is a hingeless hasp provided with a handle and the sockets within the lock-casing in connection with the lugs of the hasp. Undoubtedly, the lock described in this patent and the lock marked Exhibit 6 contain members in combination which correspond in operation, if not in construction, with certain parts in the Taylor and Romadka fasteners, and probably they narrow the field of invention in that class of devices. But they belong in the category of trunk locks operated by means of a key, and not of trunk fasteners as a substitute for straps. As a whole, they exhibit a different combination from that of the Taylor fastener and the defendant's fastener, and they do not, I think, take from the Taylor device the quality of originality. Such a form of construction and such utility are shown in that device as, to the mind of the court, are highly suggestive of originality and merit; and while Exhibit 6, and the lock described in the Hillebrand and Wolf patent of 1871, approach more nearly the application of mechanical parts developed in the Taylor device than does any other patent or device shown in the case, still, I am of the opinion that the Taylor patent ought not to be held invalid because of inventions that preceded it which belong in the trunk-lock class.

Other devices older than the Taylor fastener are here shown, such as a rifle sight, door lock, window fastener, and purse catch, but they do not militate against the Taylor device, because they show only

that certain individual parts in the Taylor combination were old,—a fact entirely consistent with originality in the combination. *Bates v. Coe*, 98 U. S. 48. This combination is not a mere aggregation of separate elements. Each one of the parts contributes to the combined result. It is not like Nimmo's apparatus in *Pickering v. McCullough*, 104 U. S. 310, cited on the argument. Here the result is due "to the joint and co-operating action of all the elements." It is not mere mechanical juxtaposition, as in that case, and as in the second claim of the patent in *Tack Co. v. Manufg Co.* 109 U. S. 117; S. C. 3 Sup. Ct. Rep. 105.

It is further contended on behalf of the defendants that the Taylor patent is void because it is for several distinct and separate inventions not connected in design or operation, as shown in the several claims of the patent. The proposition is not without force, and it seems to be rather a close question whether the several inventions of the patentee, although they are all to be applied in use to a single article, namely, a trunk, could be properly included in one patent. Section 4884, Rev. St., provides that "every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design," etc., from which the implication is drawn that every patent shall embrace but one invention.

As was said by the supreme court in *Bennet v. Fowler*, 8 Wall. 445:

"It is difficult, perhaps impossible, to lay down any general rule by which to determine when a given invention or improvement shall be embraced in one, two, or more patents. Some discretion must necessarily be left on this subject to the head of the patent-office. It is often a nice and perplexing question."

Several distinct improvements in one machine may be united in one patent. *Moody v. Fiske*, 2 Mason, 112; *Wyeth v. Stone*, 1 Story, 274. So, too, where a patentee, having invented a new and useful combination consisting of several ingredients, which, in combination, compose an organized machine, also claims to have invented new and useful combinations of fewer numbers of the ingredients, the several combinations may be embraced in one patent. *Gill v. Wells*, 22 Wall. 24.

In *Bates v. Coe*, 98 U. S. 48, it is remarked that more than one invention may be secured in one patent; but I suppose this has reference to different inventions in one machine or combination.

In *Maxheimer v. Meyer*, 9 FED. REP. 460, the patentee's claim in one of the patents was for a feed cup in connection with the vertical wires of a bird cage, and it was insisted that the patent disclosed two distinct inventions, each independent of the other, and that, therefore, the patent was void. But the court held that the inventions were connected together by being appropriate for use in the same cage for the common purpose of making a bird cage, and therefore they might be joined in one patent.

For several improvements of distinct machines, it has been repeatedly held, there must be several patents. "A patent, under the general patent act, cannot embrace various distinct improvements and inventions; but in such a case the party must take out separate patents." *Barrett v. Hall*, 1 Mason, 447. Here the court was treating of a case where each of the patented machines might singly have a distinct and appropriate use and parts unconnected with any common purpose, and therefore each was a different invention.

In *Moody v. Fiske*, *supra*, it was ruled that though several distinct improvements in one machine may be united in one patent, it does not follow that several improvements in two different machines, having distinct and independent operations, can be so included.

So, too, in *Wyeth v. Stone*, *supra*, it was said that a single patent cannot be taken for two distinct machines not conducing to the same common purpose or object, but designed for totally different and independent objects. See, also, *Root v. Ball*, 4 McLean, 177.

In *Evans v. Eaton*, 3 Wheat. 454-506, the supreme court intimated a doubt whether a patentee could claim in the same patent improvements on different mechanisms so as to give a right to the exclusive use of the several mechanisms separately, as well as a right to the exclusive use of these mechanisms conjointly.

In *Hogg v. Emerson*, 11 How. 587, it was held by a majority of the court that the inventions in question which related to an improvement in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land, were all a part of one combination when used on the water, and therefore might be included in one patent. The court say it is doubtful, on principle, whether a patent is invalid which is for two or more entirely separate and independent inventions, but that it is settled by authority that a patent for more than one invention is not void if they are connected in their design and operation, and this they held was the case before them. Four of the justices, including the chief justice, dissented, and in the dissenting opinion of Mr. Justice CATRON it is impliedly held that distinct and disconnected inventions cannot be included in one patent.

Except some decisions of the commissioner of patents cited in the brief of counsel, the cases referred to are all the adjudications bearing upon this question which have been brought to the attention of the court. There may be other cases in which the question has arisen. In the light of judicial decision on the subject, it is doubtful whether the patentee Taylor could rightfully claim his various inventions in one patent, although they were all designed to be applied to a trunk, and related to an improvement in trunks. The patent is for each improvement or device specified in the respective claims. The specification of one is separate and distinct from the other, and each is capable of a separate and independent use. Even if one is in a certain sense auxiliary to the other, it is not indispensable to

the use of the other. In fact, there is no connection, either in purpose, design, or operation, between the several inventions. They are not like a combination of various devices or improvements, all of which make one operative mechanism—one concrete organization. They are all designed for use upon one article, namely, a trunk; but they do not all tend to the accomplishment of a single result, further than that all combine generally to improve the trunk. Each is a distinct invention or improvement by itself, and the operation of one has no relation to the operation of the others. Although all may be placed upon the same trunk, each singly has a distinct and appropriate use, and in such use they are unconnected. At best, it is a matter of serious doubt whether all the claims of the patentee should have been joined in one patent. The case is one in which it seems to be within the province of the court to permit the patentee and his assigns, if they shall desire so to do, to file in the patent-office a disclaimer so as only to claim the invention specified in the third claim of the patent, and I shall dispose of the case by making the filing of such disclaimer a condition upon which the relief prayed in the bill will be granted.

The remaining defense is that the complainant is not entitled to a decree for an accounting, because certain of the patented articles, of which the trunk fasteners in evidence, marked Exhibits 13 and 15, are samples, were not marked "patented," as required by section 4900, Rev. St. The fasteners not so marked are known as the small sizes. The statute provides that it shall be the duty of all patentees to give notice to the public that the article is patented, by fixing thereon the word "patented," together with the day and year the patent was granted; "or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice." As this defense is not set up in the answer, it is doubtful if it can be made at the hearing. *Rubber Co. v. Goodyear*, 9 Wall. 788. However this may be, the complainant testifies that it is so difficult to stamp the patented article of the sizes in question as required by the statute, that the packages in which they are shipped are so stamped and labeled, as are also the invoices. I think the omission to stamp the article itself is sufficiently explained, and that this defense ought not to be sustained.

When the complainant shall have furnished sufficient proof to the court that a proper disclaimer has been filed in the patent-office, so that he shall claim only the invention specified in the third claim of the patent, a decree will be entered enjoining the infringement of that claim, and for an accounting of profits and damages, but without costs.

THE JOHANNE AUGUSTE.

THE FONTENAYE.

(District Court, S. D. New York. July 23, 1884.)

COLLISION—SAILING VESSELS—NEGLIGENCE OF LOOKOUT—OBSCURATION OF LIGHTS—CHANGE OF COURSE IN KEEPING FULL AND BY.

Where a collision occurred in a foggy or hazy night at sea, between the bark F. going east and sailing free, and the bark J. A. coming west, close-hauled, and sailing full and by, and their courses were nearly opposite, and they collided nearly end on, the F. having seen the other's red light when about one-third of a mile distant, and at once ported, and then saw both lights, and afterwards the green light only, when the J. A. was two or three lengths off; and the J. A. saw no light at all on the F. until about the moment of collision, when the green light was seen: *held*, that the change in the appearance of the J. A.'s lights was caused by her own change of course in following the variations of the wind; that the F.'s green light must have been in view when one-third of a mile off, and failure to see it must be held proof of inattention and neglect of the lookout, his testimony not being had; that if the F.'s green light had been seen, as it ought to have been, the J. A. would have been bound to keep her course strictly, instead of following round with the wind, and hence her change of course was a fault contributing to the collision. *Held, also*, that the red light of the F. ought to have been seen long before the collision, and being eagerly looked for and not visible, and being placed aft near the taffrail, where it was liable to be obscured by the sails, or by the swell of the ship forward, or other obstructions, it must be deemed to have been either obscured or improperly screened, and for this the F. was also held in fault, and the damages were divided.

In Admiralty.

William H. Field, for Munro and the Fontenaye.

Jas. K. Hill, Wing & Shoudy, for Bischoff and the J. Auguste.

Brown, J. The cross-libels in the above suits were filed to recover the damages respectively sustained by the owners of the barks Fontenaye and Johanne Auguste, through a collision which took place between the barks in the Atlantic ocean, off Nantucket shoals, at about 4 A. M. of September 6, 1881. The Fontenaye claims damages to the amount of \$16,000; and the Johanne Auguste, to the amount of \$10,000. Each alleges that the collision occurred by the fault of the other. The stem and bow of the Fontenaye were carried away in the direction from port to starboard. The Johanne Auguste was struck and damaged in the starboard bow only. These facts are of importance in the conflict of evidence on other points.

The Fontenaye was an iron bark, 180 feet long, 28 feet beam, and of 635 tons register. She left New York early in the morning of September 5, 1881, loaded with a cargo of wheat, and bound for London. During the night following the weather was overcast, dark, and hazy. The witnesses from the Fontenaye say there was some fog, but not enough to require the use of the horn. The other bark's witnesses say that it was dark, but with no fog. The sea was moderate; the wind light, and variable from S. W. to S. S. W. The Fontenaye was

on a course S. E. by S. by the ship's compass; but the deviation on this iron ship, together with the variation, amounted to four points; and her true course is stated to have been E. by S. She was, therefore, sailing free, with the wind two or three points aft of abeam, and was making about six knots per hour. Her colored lights were abaft the mizzen rigging, about six or eight feet only forward of the stern, and were sustained by braces about a foot above the poop rail, and a foot outside of it. The account of the collision given by her witnesses is, in substance, that the lookout, Armstrong, first saw the red light of the Johanne Auguste about half a point off his starboard bow, which he immediately reported to the second mate, who was then in charge of the navigation; that the second mate was then standing on the starboard side of the poop, and at the same time saw the red light against the fore rigging, or about half a point on his starboard bow, estimated to be half a mile distant; that he immediately ordered the helm to port, which order was obeyed, and the vessel commenced to luff to the southward; that after giving the order to port he walked back, looked at the compass, looked again at the red light, and saw it bearing a little more forward than before, and nearly right ahead; that he then walked over to the port side, looked at the compass again, and saw the ship coming round to the southward of her course a point or more, then walked from the port quarter, and saw the green light only, a little on the port bow, only about two lengths distant; and that the collision happened a few moments afterwards. The lookout testified that, shortly after reporting the red light, he saw the green and red lights nearly ahead, but a little off the port bow, less than a quarter of a mile distant; that afterwards he saw the green light only, about a point off his port bow, when she was very close; that he then thought there would be a collision, called the watch below, and ran aft. The captain came from below only at the moment of collision. Going immediately forward, he found the starboard bow of the Johanne Auguste entangled with his own head-gear on the starboard side, and the stern of the Johanne Auguste pointing directly ahead of him. His bowsprit and jib-boom were knocked away and turned over upon the forecastle, and the whole of the head completely knocked off, and the forecastle deck smashed in about 15 feet abaft of the knight-heads, the head-stays carried away, and some of the back-stays, foretop-gallant mast, royal yard, and head-sails carried away. It was about half an hour before the vessels cleared. He afterwards bore for Boston for repairs. On the way he was boarded by a pilot, who testifies that he saw the colored lights of the Fontenaye seven miles off.

The Johanne Auguste was a wooden-built bark, 200 feet long, 32 feet beam, and of 918 tons register, bound from Bremen to Philadelphia, loaded with a cargo of general merchandise. Her witnesses testify that the sea was smooth, the wind variable from S. W. to S. W. by S., and the night very dark. Most of them say it was hazy, and all

of them say there was no fog; that the first officer took charge of the navigation at 4 o'clock, a few minutes before the collision, when the captain went below; that the ship was upon her port tack, sailing close-hauled, and by the wind, which was shifting, so that her course varied from about W. $\frac{1}{2}$ N. to W. by N. $\frac{1}{2}$ N., (magnetic,) and making about five knots an hour; that her colored lights were forward, about three feet above the rail of the top-gallant forecabin. The testimony of the lookout was not obtained, but it is admitted that no efforts were spared to procure him; and the same admission was also made in regard to the absence of the man at the wheel of the Fontenaye.

The first officer of the *Johanne Auguste* testifies that his attention was first called to the Fontenaye by his lookout, who reported, "Ship right ahead," to which he answered, "All right;" that he was then standing on the port side of the poop-deck, between the mizzen-mast and the skylight; that he walked a few feet forward, and heard the lookout sing out again, but did not hear distinctly what he said, and that he replied, "All right," went to the pilot-house, looked under the sail, and could see nothing; that he then ran to the cabin, got a night-glass, and ran forward as fast as he could, and, when going up the steps to the forecabin, he asked the lookout, Anderson, if he could see any light, to which he said, "No;" that he then went to the capstan, where Anderson pointed out the vessel, which he could see, but that no light was visible; that with the use of the glass he could see nothing more; that the ship was then seen about three-quarters of a point off his starboard bow; that he supposed from seeing no lights that he was following the other vessel; that he watched her about half a minute, and, seeing that he was gaining upon her, ordered his helm hard a-port, and ordered one of his men to go aft and repeat the order; that after standing a minute or a minute and a half by the capstan, he suddenly saw the green light almost ahead, about a quarter of a point off his starboard bow, when he immediately gave the order hard a-starboard, that another man observed and spoke of the green light at the same time, and that the collision took place some 10 or 15 seconds afterwards, the jib-boom of the Fontenaye ranging from the starboard bow; that no red light on the Fontenaye was seen; that they were entangled about 25 minutes, having met nearly end on; that the *Johanne Auguste* was struck upon her starboard bow, a few feet only from the stem; and that at the time of collision her sails were full, and that she was heading W. by N. The variation at the place of collision was three-fourths of a point west. The man at the wheel testified that the wind was S. W. by S., but variable; that his orders were to sail by the wind, and that he kept the vessel heading about W. $\frac{1}{2}$ N., by compass; that the sails were full, sometimes a little shaky; that he heard the hail from the lookout, and saw the mate run forward, as he testified; that he was soon after ordered to port the helm; that he put the helm hard a-port, looked at the compass, and saw that he was then heading W. by N.;

that right away he had the order, "hard a-starboard," which he obeyed; and that as soon as this last order could be obeyed the collision came,—a very hard blow; that he again looked at the compass, and that the vessel was then heading W. by N., with the sails full; that he thought it was from a minute and a half to two minutes between the orders hard a-port and hard a-starboard; that the vessel had not altered her course under the starboard helm, as the collision took place immediately; and that just after the *Fontenaye* struck she lay with her bows on his starboard, and the stern on his port side. These statements of the wheelsman as to compass courses cannot be accepted as strictly accurate, since they allow nothing for the variations of the wind, which he was ordered to follow, and nothing for any change, even under his port helm, which must have canted his vessel at least somewhat to the northward; and he makes his course W. by N. at the moment of collision as well as when he ported, though the intervening starboard helm made no change. Such variations must be allowed from the courses which he states as the other proofs require.

In other respects the two accounts, in their general features, are not so irreconcilable as they at first appear. Each, with the exception above stated, is consistent with itself, and agrees so perfectly with the orders which would naturally be given, upon the facts as testified to, and which unquestionably were given at the time for the navigation of each vessel, that both must be accepted as correct, so far as it is possible to harmonize them, in the absence of anything to throw discredit upon either. With some modifications of the mere estimates of the times and distances stated, and some additional slight changes, the two accounts will be found to harmonize, and to confirm each other in all their essential features. At the same time they disclose faults in each vessel.

Counsel for the *Johanne Auguste* contends that her green light, and not her red light, was first seen by those on the *Fontenaye*, and that the two witnesses who testify to seeing the red light either misstate the fact or mistook the light. But it is incredible that the mate of the *Fontenaye*, if he really saw the green light, should have at once ordered his helm hard a-port, as he certainly did, so as to make directly for an obvious collision. Seeing the red light, as he and the lookout testify they did, porting was the natural and obvious course. Neither can any mistake of the green light for the red be considered as having the slightest probability in this case; for the successive changes which were seen—first the red light, then both lights, and then the green light alone—forbid any such hypothesis. These changes of the *Johanne Auguste's* lights in the order stated, I regard, therefore, as fixed facts. They could not have been produced by the *Fontenaye's* change of course, for she was veering to the southward, under her hard a-port wheel; and any change thereby produced in the appearance of the other's lights, if any, would have been a change

in the opposite order of succession. The change of lights was therefore produced by the *Johanne Auguste's* change of course to the southward. There is nothing in the testimony of her witnesses which renders such a change improbable. They all agree that she was sailing close-hauled *by the wind*, and that the wind was variable. The captain states her course to have been from W. $\frac{1}{2}$ N. to W. by N. $\frac{1}{2}$ N., (magnetic,) or, allowing three-fourths of a point for variation, from W. $\frac{1}{4}$ S. to W. $\frac{3}{4}$ N., following the variations of the wind. A change of one point by the *Johanne Auguste*, in following the wind to the southward under a starboard wheel, from the time her red light was first seen, will fully account for the successive changes in her lights, as seen on the *Fontenaye*; and I have no doubt that change was made, and that it caused the change of lights as testified to. The wheelsman of the *Johanne Auguste* denies any change of course from the time he took the helm up to the hard a-port wheel; but he agrees with all the other witnesses that he was sailing by the wind, and that the wind was variable. His testimony cannot be understood to mean that he did not make such changes as would keep her full and by. In that connection that would not be called a change of course. His course was full and by. But if he means that no change at all, even to keep her full, was made during that time, then I cannot credit his statement; both because it is improbable in itself, and because it is overborne by the certainty that the *Johanne Auguste* did change her heading enough to exhibit the changes in her lights, as before stated. A change of about one point was probably made between the time when the red light was seen and when the *Fontenaye* was seen looming up so near them, when the order was given to port the helm. At that time the wheelsman says he looked at the compass, and it was W. by N., i. e., W. $\frac{1}{4}$ N., true. This was probably about the time when her green light was seen by the *Fontenaye*, when only two or three lengths distant. Both the statement of the libel and of the answer of the *Johanne Auguste*, and the testimony of the mate, show that the *Fontenaye* was then very near; she "appeared high up in the water," and the few things done hurriedly by the captain, after the order to hard a-port, show that the time before the collision was undoubtedly less than a minute. The black mass of the *Fontenaye*, moreover, could not have become visible till some considerable time after the red light of the *Johanne Auguste* was seen, and it was during this interval that the change of course, in hauling, perhaps a point, to southward, was probably made. If this was a change of one point to W. $\frac{1}{4}$ N., that would make her previous heading, when the red light was seen, W. by N. $\frac{1}{4}$ N., or only half a point further north than the captain's statement of the variation. Whether this change of course was or was not a fault, depends upon whether the *Johanne Auguste* had notice of the *Fontenaye's* approach. If she had seen, or ought to have seen, the *Fontenaye's* lights, or either of them, then, being close-hauled, she was bound by the rules

to keep her course, and not to change, even to keep close to the wind. The testimony on both sides, however, leaves no possible doubt that the *Johanne Auguste*, when her red light was first seen, was to windward of the *Fontenaye's* course at that time, whatever that exact course was. It is on this point that I must find the facts essentially different from what the counsel of the *Johanne Auguste* claims. Not only do the *Fontenaye's* witnesses say that the red light was seen a little on their starboard bow, but the place of collision was only reached by the *Fontenaye* under a hard a-port wheel, which changed her course nearly two points, and hence carried her a distance squarely to windward, equal to about one-fifth of the curve traversed; and the witnesses on the *Johanne Auguste* also testify that the *Fontenaye*, when first seen, was about a point on their starboard bow, *i. e.*, to leeward; and, finally, the direction of the colliding blow shows the same thing. It is manifest, therefore, that the *Fontenaye's* green light was exposed to the view of the *Johanne Auguste* at the time the latter's red light was seen, and so remained until shut in by her change of course under her hard a-port wheel, in her endeavor to get out of the way. The green light was burning; it was a brilliant light; there were no sails on the starboard side to obscure it; and that it was not obscured, nor so placed as not to show on her starboard side, is proved by the fact that it was seen afterwards, just before the collision, and apparently a little sooner than it ought to have been seen, if it was in its exactly proper position. There seems to me but one possible explanation of the failure of the lookout of the *Johanne Auguste* to see this green light; and that is, inattention and neglect of his duty during the few moments when this light was certainly in view. The reasons for not producing the lookout as a witness, though satisfactory, do not make up for the want of his testimony to exculpate him, if possible, from what must appear to have been clear neglect in not observing the *Fontenaye's* green light. *The Star of Scotia*, 2 FED. REP. 578. Had it been seen and reported as it ought to have been, the *Johanne Auguste* would have been bound to keep on her course as it then was, and she would doubtless have done so, instead of following around to the southward with the wind; and the collision would have been thereby avoided. Her counsel charges inattention on the part of the lookout of the *Fontenaye* in not seeing the lights sooner. But if the weather was not so thick as to prevent the red light's being seen any sooner than it was seen by the lookout of the *Fontenaye*, then, since the *Johanne Auguste* must have been to windward of the *Fontenaye's* course for at least some little time previous, the remissness of the lookout of the *Johanne Auguste* would, in that case, be only the more flagrant, in not seeing the green light of the *Fontenaye*, which would have been all the longer exposed to view. The *Johanne Auguste* must be judged according to what she ought to have seen. Her change of course, after the *Fontenaye's* green light ought to have been observed, must therefore be adjudged

a fault contributing to the collision, for which she must be held liable.

2. There is no less doubt that the red light of the Fontenaye ought to have been seen very shortly after she ported. When the Johanne Auguste's red light was seen, the two vessels were very nearly ahead of each other; the Johanne Auguste being a little to windward of the other's course—a hundred feet, perhaps—and being then headed so as to cross that course a little ahead of the Fontenaye, and so as to make an angle of perhaps a third of a point with the line of her course, just sufficient to expose the Johanne Auguste's red light only at that time. Upon porting, the Fontenaye's red light should very soon have come into view, and so remained till the collision. It was not seen at all. After the collision it was inquired for, and in reply the men on the Fontenaye pointed it out, still burning. Though only the mate testifies that it could not be seen before the collision, I cannot doubt the correctness of his narrative in this particular. The lights were eagerly looked for; none were seen. He ran forward; still none could be seen, and the red light was not seen till some of her men came aboard of the Fontenaye. There was no such inattention or negligence on the Johanne Auguste, when the red light ought to have been seen, as can serve to explain the failure to see the red light. The only alternative is that it was either obscured or improperly screened; it is immaterial which. *The Tirzah*, 4 Prob. Div. 33. The sails were upon the port side, and might have obscured it. The position of the lights so near the taffrail, with the swell of the ship's side in front, exposed them to peculiar danger of being obscured. If the screen were adjusted parallel with the poop rail, that also would have thrown the line of obscuration somewhat to port instead of directly ahead; sufficient, probably, to have prevented the red light's being seen by a vessel so nearly ahead as the Johanne Auguste was during all this time. It is impossible, and it is unnecessary, to determine in what particular way, or from what cause, the red light of the Fontenaye was obscured. I am satisfied it was obscured. Had it been seen when it ought to have been seen, I cannot doubt that the Johanne Auguste, by porting earlier than she did, might have escaped the collision, and would have done so. The Fontenaye must be held responsible for any obscuration of her light, especially when placed in the extreme after-part of the ship, where there is such increased danger of obstruction, (*The Tirzah*, *supra*;) and it results that both vessels must be held in fault and the damages divided.

The above considerations satisfy my own mind as to the proper determination of the case, without commenting on the differences in the testimony concerning the condition of the weather; and the above result would not be changed whether the weather was foggy or not. The fact, however, that neither lookout saw any light sooner, is, I think, more rationally explained by supposing that the weather was somewhat foggy, as the witnesses of the Fontenaye testify, or very hazy, as most of those from the Johanne Auguste say; rather than

that both lookouts were inattentive and negligent for a considerable period before the red light was seen. I am satisfied that the weather must have been such as greatly to obstruct seeing lights at a distance, and that the vessels, when the red light was seen, were even less than half a mile apart. This, I think, is to be conclusively inferred from the fact that the Fontenaye, though going at the rate of about six knots, had time to luff only about two points under an immediate hard a-port helm. One-sixth of a mile would be a large allowance of sailing distance in which to accomplish so small a change of course; and as the Johanne Auguste was going at the rate of five knots, she would make about 830 feet in the same time; giving less than one-third of a mile as the probable distance between them. It is noticeable that the witnesses of the Fontenaye are unwilling to swear positively to even as much change as two points. If the lights might have been seen at a much greater distance, then both lookouts were equally negligent; and if the lights could not be seen more than one-third of a mile off, then, under the rules, both ought, I think, to have used their fog-horns; and in either case the result would be the same, as I have determined on other grounds.

To explain a little further my view of the mode in which the collision took place, I may add that in constructing a diagram to represent the position and probable courses of the vessels I should make the Fontenaye, when the red light was seen, heading E. by S., (true;) put the Johanne Auguste about one-third of a mile ahead of her, and about 100 feet to windward, and heading W. by N. $\frac{1}{2}$ N., (true.) The point of collision would fall about 200 feet to the windward, and about 1,100 feet ahead, of the Fontenaye's first position. At that point the Fontenaye would be heading S. E. by E., and the Johanne Auguste W. $\frac{1}{2}$ N.; the latter having, meantime, swung first to W. $\frac{1}{4}$ N., when more than half the interval had been passed, and then ported, and again starboarded, bringing her at the collision to W. $\frac{1}{2}$ N. This makes the general courses of the Johanne Auguste, during this period, about half a point, or more at times, to the northward of those stated by the wheelsman. But his statements cannot all be accurate. The course of the Fontenaye, however, may at this time have been somewhat more to the northward than her true course of E. by S. The mate allows a variation of half a point. If such a variation to the northward, i. e., E. $\frac{1}{2}$ S., be taken for the Fontenaye's course at the time when the red light was first seen, then a corresponding change of half a point to the southward in the diagram of the Johanne Auguste's courses would bring the courses of the latter into close correspondence with the testimony of the Johanne Auguste's witnesses, and the result would be the same. Some slight variations must be made in the courses stated by the witnesses, to the extent of one-half or three-quarters of a point; it is immaterial on which side they are placed, or whether they are distributed between the two.

THE LUCY D.

(District Court, S. D. New York. July 14, 1884.)

1. COLLISION—TOW—RIVER NAVIGATION.

In passing an established harbor, like Elizabethport, New Jersey, on the border of a narrow stream, tugs with large tows, which require the use of nearly the whole channel, are bound to take extraordinary precautions in giving notice of their approach, and to give, if needed, effective aid to vessels unwarily coming to anchor in places of danger; and such vessels, on receiving actual notice of approaching danger from such tows, which are in the habit of passing, are also bound to take immediate measures to get out of harm's way.

2. SAME—VESSEL AT ANCHOR—FAULT.

Where one of a fleet of 21 canal-boats came in collision at Elizabethport, New Jersey, at about 2 A. M., with a schooner which arrived there and came to anchor about 10 P. M., about 100 feet off the dock, in a place dangerous from such passing tows, *held*, both in fault.

In Admiralty.

E. D. McCarthy, for the libellant and the Wilbur.

Owen & Gray, for the schooner.

BROWN, J. The libellant, who is the owner of the canal-boat Monitor, sues to recover for his damages occasioned by a collision with the schooner Lucy D., at about 2 o'clock in the morning of December 22, 1882, while the schooner was at anchor at Elizabethport. The Monitor was one of a fleet of 21 boats coming up to New York with the flood-tide, in tow of the steam-tug Wilbur, and was the outer boat of the fourth tier on the port side of the tow. Under the new supreme court rule in admiralty, No. 59, upon the application of the defendant vessel, the steam-tug Wilbur has also been made a party defendant. See 15 FED. REP. 162.

The Lucy D. sailed down to Elizabethport and arrived there at about 10 o'clock P. M., and came to anchor either off pig-iron dock, or two or three piers above, and from 100 to 200 feet out in the stream. The entire channel there is but 600 or 700 feet wide, and tows have been accustomed to come up with the flood-tide. Just below the pig-iron dock is a considerable bend in the stream, so that the flood-tide sets tows coming up stream towards the pig-iron dock, thence for a short distance parallel with the stream, and then a little towards the opposite shore. At the strength of the flood the current runs about three knots. In coming round this bend, a tug with a tow upon a hawser, like the present, must go ahead at full speed, or the tow will run upon the docks or become unmanageable. There can be no question, from the evidence, that the navigation of such tows through this narrow stream is attended with more or less of danger to vessels at anchor at Elizabethport. The danger diminishes, however, the further vessels are anchored above the pig-iron dock, as the channel becomes wider above, and the flood-tide is deflected somewhat to the opposite shore. Notwithstanding the custom for tugs with large

tows to come through this channel-way, they have no right to appropriate it to themselves exclusively. They must be held legally bound, when navigating with tows of such size and of an unwieldy character, to take all requisite precautions to see that other vessels are out of their path, or receive due notice and assistance to get out of the way. The master of the *Lucy D.* was a comparative stranger at Elizabethport, although he had been there some years before. He anchored within a reasonable distance of the piers, where vessels were formerly accustomed to anchor to some extent, but much less in late years, both from the decrease of shipping there, and probably from the greater danger from tows. Another vessel was at anchor but a short distance above him. There was more room further up, where he might have anchored as well. An hour or two before this collision he had notice from the helper of another tow that he was in a dangerous position. The pilot of the *Stickney*, a helper, which had passed down at about 11 or 12 o'clock to assist another tug and tow coming up ahead of the *Wilbur*, had shouted to this vessel, as he passed down, to get out of the way; but it is not proved that this notice was heard. Not long after, however, the *Stickney* returned, ahead of her tow, for the purpose of getting this schooner out of the way before her tow arrived. A line was got out to the schooner, and the *Stickney* undertook to pull her in nearer to the Jersey shore; but the line broke, and the schooner swung back to her place. The first tow, however, passed the schooner safely; but in doing so it grounded on the opposite shore, a little way above. The *Wilbur* following not long after, with her tow, avoided grounding, but the libellant's boat swung against the bows of the schooner, and received injuries from which it shortly afterwards sank.

I think the *Lucy D.* must be held to be chargeable with negligence, if not for anchoring so low down the stream as she did,—the captain being a stranger there,—yet certainly for not taking any steps of her own to move further inshore when the *Stickney* undertook to haul her further in, for this was the best possible evidence to the captain that he was in an improper and dangerous position. Notice was then, at least, given him that the *Wilbur* was to follow the previous tow; and there was ample time for the schooner to have been brought to a safe position, even by her own efforts, had she heeded the warning. *The Cachapool*, 7 Prob. Div. 217.

In a place like Elizabethport it is but reasonable, however, to hold that tugs carrying such large tows, which are so dangerous to shipping at anchor, should be required to take affirmative measures of their own in assisting to keep the channel clear in those places where they virtually need to appropriate it almost wholly to themselves; and to see that strangers arriving there, who do not fully know the room required by such tows, and who unwarily come to anchor in a dangerous place, should have timely notice, with the offer, if need be, of all necessary help to get out of the way. The same principle ap-

plies as in the case of an intended launch. *The Cachapool*, 7 Prob. Div. 217. Some of the evidence would indicate that the Stickney was designed to act in behalf of the Wilbur's tow in getting the Lucy D. out of the way. It does not clearly appear, however, whether the slight effort of the Stickney to move the Lucy D., after the first tow had passed, was a mere voluntary, friendly act, or whether the Stickney undertook this service by some definite arrangement in behalf of the Wilbur and her tow. In either event, the Stickney's services were evidently inefficient and faulty. Her lines broke at first, and afterwards no decisive measures were taken to assist the schooner; nor does the absolute necessity of her removal appear to have been decisively urged upon her, as certainly should have been done had she been anchored so far down stream as opposite the pig-iron dock.

On the whole, I feel bound to hold, considering the dangers of the place arising from the navigation of tows of such a character in so narrow a channel, that extraordinary precautions are incumbent upon those in charge of such tows; and that the Wilbur must in this case be held jointly responsible for the loss, for not having provided such effective measures as were fairly incumbent upon her, to see that no injury happened to vessels unwarily anchoring in that vicinity. Each must, therefore, pay half the damages, with costs, and a reference may be taken to ascertain the amount.

KIMBALL v. BOARD OF COM'RS and others.*(Circuit Court, D. Indiana. July 17, 1884.)***1. MUNICIPAL DEBT IN EXCESS OF CONSTITUTIONAL LIMIT—COUNTY BONDS (INDIANA) IN AID OF GRAVEL ROADS—COUNTY LIABILITY.**

County bonds, issued under the laws of Indiana for the construction of gravel roads, notwithstanding the special provision made for payment by assessments upon lands within two miles of the improvement, constitute a county indebtedness within the meaning of the amendment of March 14, 1881, to the state constitution, which forbids and declares void any debt of any political or municipal corporation in excess of 2 per centum on the taxable property within such corporation.

2. SAME—POWER OF COUNTY BOARDS—PUBLIC IMPROVEMENTS—PRIVATE BENEFITS.

Under the gravel-road laws of Indiana, which require the proposed improvement to be of public utility, county boards may issue bonds which shall constitute a general county liability to construct such roads, though the benefits may inure mainly to a particular district or to individuals.

3. SAME—VOID BONDS—RECOVERY OF MONEY PAID FOR—IDENTIFICATION NOT NECESSARY.

In an action for the recovery of money paid to a county for a void issue of bonds, it is no obstacle to the granting of relief that the money has been commingled with other moneys and cannot be identified, if the proper amounts can be ascertained.

In Equity.

Claypool & Ketcham, for complainant.

Harrison, Miller & Elam, for defendants.

WOODS, J. This bill is brought against the board of commissioners and the treasurer of Grant county, Indiana, for the recovery of money paid by the plaintiff to the county as the purchase price for certain bonds of the county, issued and sold to the plaintiff under orders of the board, for the purpose of raising money to be used in the construction of free turnpike roads in the county theretofore ordered by the board to be constructed. The ground on which the plaintiff predicates his claim of right to recover the money is that the bonds issued to him were illegal and void, because, when they were issued, the county was already indebted to the full amount of two per centum of the taxable property within the county, as determined by the last assessment for state and county taxes previous to the issue of the bonds; that the plaintiff purchased the bonds in the belief that they constituted a lawful security; and that the money which he paid to the county for the bonds is still in the county treasury unexpended. An offer to surrender the bonds to the county, and a demand for the return to the plaintiff of his money before the bringing of the action, are alleged, and also an offer and readiness to produce the bonds in court for surrender.

The answer, which is verified, does not controvert the allegations of the bill, but shows in detail the proceedings had before the board of commissioners of the county for the construction of certain free

gravel roads in the county, and that, for the purpose of obtaining the money necessary to make the proposed improvements, the board, on the twenty-third day of July, 1883, made an order authorizing the issue and sale of bonds of the county to the amount of \$43,000; that the bonds were issued and sold to the plaintiff for the sum of \$43,000, and the money received therefor put into the county treasury, where a part of it remains mingled with other moneys of the county; that the board had contracted with certain persons named for the construction of the proposed roads for which the money was borrowed, who had entered upon, partly performed, and were prosecuting the work according to contract. The plaintiff has filed exceptions to these averments of the answer as immaterial and insufficient.

The statute under which the bonds were issued was enacted in 1877, taking effect March 3d of that year, and confers upon the board of commissioners of any county in the state power, as in the act provided, to construct, improve, and maintain free turnpike or gravel roads in the county, and after various provisions in respect to the proceedings, requiring, among other things, an assessment upon benefited lands lying within two miles of the improvement, the seventh section reads as follows:

"For the purpose of raising the money necessary to meet the expense of said improvement, the commissioners of the county are hereby authorized to issue the bonds of the county, maturing at annual intervals after two years, and not beyond eight years, bearing interest at a rate not to exceed six per cent. per annum, payable semi-annually, which bonds shall not be sold for less than their par value. Said assessment shall be divided in such manner as to meet the payment of principal and interest of said bonds, and so be placed upon the duplicate for taxation against the lands assessed, and collected in the same manner as other taxes; and when collected as other taxes, the money arising therefrom shall be applied to no other purpose than the payment of said bonds and interest: provided that no bonds shall be delivered or money paid to any contractor, except on estimate of work done as the same progresses or is completed; and said road or improvement shall be kept in repair as other state and county roads are: provided, further, that the amount of such bonds outstanding at any one time shall not exceed the sum of one hundred thousand dollars principal." Rev. St. 1881, §§ 5091-5112.

A later act (1883) has increased the maximum of bonds that may be outstanding to \$150,000.

The question to which in the main the discussion of counsel has been directed, is whether or not the bonds of a county, issued by this authority, constitute an indebtedness of the county within the meaning of an amendment to the constitution of the state, adopted March 14, 1881, which declares:

"No political or municipal corporation in this state shall ever become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness: and all bonds or obligations in excess of such amount, given by such corporations, shall be void: provided, that in time of war, invasion, or other great public calamity," etc.

Two principal reasons are urged against an application of this inhibition to these bonds: *First*, that the bonds evidence no general liability of the county, because they are payable solely out of the assessments made, as required by the statute, upon lands within two miles of the improvements, to promote which they were issued; *second*, that if the bonds be conceded to be obligations of the county, yet, because of the special means for their payment provided in local assessments, the proceeds of which can be applied to no other purpose than their discharge, the debt should not be deemed to be within the scope of the inhibition.

In support of these propositions, counsel have referred to the following, among other, cases and authorities: *Jordan v. Cass Co.* 3 Dill. 185; *County of Cass v. Johnston*, 95 U. S. 360; *Davenport v. County of Dodge*, 105 U. S. 237; *Meath v. Phillips Co.* 108 U. S. 553; S. C. 2 Sup. Ct. Rep. 869; *U. S. v. County of Clark*, 96 U. S. 211; *U. S. v. County of Macon*, 99 U. S. 582; *Sackett v. City of New Albany*, 88 Ind. 473; *City of Springfield v. Edwards*, 84 Ill. 626; *Burroughs*, Pub. Secur. p. 635, § 51, p. 545, § 47; *Story*, Eq. § 1044; 1 Dill. Mun. Corp. 486.

In my judgment neither of these propositions is true, or supported by the decided cases. In respect to the first, it cannot be said to be true in fact that the bonds are payable solely from the proceeds of the special assessments, unless an inference to that effect must be drawn from the requirement that the assessment be made, and that the money derived therefrom shall be applied to no other purpose. But this inference, as it seems to me, in the light of the whole statute, is neither necessary nor admissible. While the special fund is provided, which may be used for no other purpose, it is not declared that no other fund may not be used for the same purpose. The suggestion made, that if other funds be used to pay such bonds the special fund when collected could not be used at all, presents no difficulty. It is sufficiently manifest that in such case the special fund should be used to replace the sum first taken from the general funds. The letter of a single clause cannot be permitted to kill the spirit of an entire statute. Indeed, this clause, as I suppose, adds nothing to the force of the statute, as without it the fund specially provided for the payment of the bonds must have been held to be no less sacredly devoted to that purpose. The express declaration against any other use can at most be regarded only as emphasizing what would have been the rule without such expression.

In this view, the decision in *U. S. v. County of Clark*, *supra*, is inconsistent with the propositions asserted by the respondents, for in that case, notwithstanding a special tax authorized for the purpose of paying the bonds of counties issued in aid of a railroad company, it was held "that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax authorized, the holders [of the bonds] were entitled to payment

out of the general funds of the county," (see *U. S. v. County of Macon, supra*;) and in the opinion it is said:

"There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the states, and more than once by the federal government. Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtor."

In *Jordan v. Cass Co.* and *County of Cass v. Johnson* it was not claimed that the bonds sued on were a debt of the county; and the action in each case was prosecuted, and finally upheld by the supreme court, for the purpose of ascertaining the amount due, and obtaining against the county formal judgment, which could be enforced only by *mandamus*, compelling the levy and collection of the necessary taxes or assessments upon the local district for which the bonds had been issued. Any pretense of a general liability of the county in these cases was impossible, on account of an express constitutional provision, which is quoted by Judge DILLON in his opinion in *Jordan v. Cass Co.*

In the case of *Davenport v. County of Knox* there was no constitutional provision to consider, but the statute under which the bonds were issued left no room for asserting that they created a county obligation. In the same act provision was made for the incurring of liability both by counties and by precincts,—bonds to be issued by the county commissioners in either case; but in the case of a precinct, "special bonds" "for such precinct;" and in accordance with the practice recognized in the other cases (*supra*) judgment was rendered against the county in form, but enforceable only against the property of the district. Nothing more than the right to this relief was claimed in the bill, and beyond this these decisions establish nothing; and further than this, as it seems to me, they afford no aid to the present discussion. For similar cases see *U. S. ex rel. v. Co. Com'rs Dodge Co.* 110 U. S. 156; S. C. 3 Sup. Ct. Rep. 590; *Blair v. County of Cuming*, 111 U. S. 363; S. C. 4 Sup. Ct. Rep. 449.

There is, however, authority which is directly in point. The Indiana statute under consideration is a transcript in substance, and almost literal, from an Ohio statute which was enacted in 1867, and under which arose a case that was decided by the supreme court of Ohio in January, 1882. See *State v. Com'rs*, 37 Ohio St. 526. The county of Fayette had issued bonds under the statute, but at the suit of owners of some of the lands assessed the assessment in respect to those lands had been annulled, (*Hays v. Jones*, 27 Ohio St. 218;) "so that, after applying the amount collected on the assessment, twenty-nine of the bonds, for \$500 each, were left wholly unpaid and unprovided for." The action was to compel the board of commissioners to levy a general tax in order to provide for the pay-

ment of these bonds, and the objection was made, as in the present instance, that the bonds were payable only out of the special assessment, and were not obligations of the county enforceable generally. The court ruled the contrary, and after quoting from the seventh section of the act, indetical with the section quoted *supra*, said:

"From the language of the statute here quoted, perhaps no one would deny that the debt evidenced by the authorized bonds is the debt of the county in its *quasi* corporate capacity. Indeed, the language is not susceptible of any other meaning; but inasmuch as the same section provides for an assessment upon the lands specially benefited, and lying within two miles of the improvement, to meet the payment of the interest and principal of the bonds, it is contended that no other mode or manner of taxation can be resorted to for the purpose of paying the bonds. However plausible this contention may be, we think it cannot be maintained. That the legislature might have so provided we do not deny, but if such was the intention it should have been expressed in very clear and unmistakable terms. Such terms were not used, nor is such inference clear. On the other hand, the liability of the county in its *quasi* corporate capacity is expressed in apt and unmistakable words, and if, for such liability, a portion only of the taxable property of the county can, in any event, be taxed, such intent on the part of the legislature should have been expressed in like apt and unmistakable terms, as between the county and the taxing district created by the statute, to-wit: 'The territory within two miles of the road improvement.' It cannot be doubted that the intent of the statute was to impose the burden of the improvement upon the latter, but as to the creditor holding bonds issued to meet the expenses of the improvement, the faith of the county, to the extent of all its taxable property, was pledged, by the express authority given to the commissioners, to issue therefor the bonds of the county. Whenever, therefore, payment of the bonds cannot be provided for by local assessment, under the statute, it is the duty of the commissioners to make provision for their payment, as for the payment of other debts of the county, by a levy upon all the taxable property of the county."

The point established, as I think it must be held to be, that the bonds are an obligation or debt of the county, the constitutional restriction must apply, as it seems to me, notwithstanding the special fund, or, rather, resource, provided in the statutory assessment for their payment; and notwithstanding the fact, which may be conceded, that in most cases the assessment will ultimately prove collectible in sums sufficient to pay the debt and interest. This assessment was doubtless designed mainly to secure an indemnity to the county, and incidentally to enhance the value of the bonds in the market; but the special provision for payment cannot reasonably be said to remove the force of the authority given to issue the "bonds of the county,"—words which, *ex vi termini*, import an obligation of the county; and such an obligation is a debt, within the clear and comprehensive language of the constitution already quoted. If not, then why should any form of indebtedness be deemed obnoxious to the provision, if only payment be provided for, either by special assessment or by a general levy of taxes, made or required to be made? Such a construction would practically remove all restriction from the legislative will, since by requiring an assessment or general levy, however

large, and divided and distributed over whatever number of years for collection, the legislature might authorize the issue of bonds at pleasure, piling one assessment or levy upon another, without regard to the amount of existing indebtedness; and so, notwithstanding the supposed amendment to the constitution, the mortgaging of the future for the extravagant indulgence of the present might go on unhindered. Possibly, by means of "bonds of the county," made payable exclusively from the proceeds of local assessments, the constitutional restriction may be evaded; but, if so, the legislative purpose to do it should be clearly expressed, or unmistakably and necessarily implied from the language of the statute. All municipal indebtedness must be paid with moneys derived either from special assessments or from tax levies; the property of the corporation or of its inhabitants cannot be taken upon an execution at law; and consequently, as seems clear to me, a municipal obligation ought to be deemed to be no less a debt, within the meaning of the constitution, because an assessment or levy has been already made or required to be made preparatory to its future payment. There is nothing to the contrary of this in the decision of the supreme court of Indiana in the case of *Sackett v. New Albany*, *supra*, nor in the Illinois and Iowa cases referred to in that opinion. "The suitable provision for the discharge of an obligation," which, according to those cases, as I understand them, may justify the issuance of an order upon the municipal treasurer, must be the possession of "the ready means necessary to pay a claim against it." They certainly do not mean that an assessment or levy, made or to be made, and to be collected in the future, for the payment of a debt not due, is a suitable provision. Nothing less, however, will support the position of the respondents.

Besides being within the letter, the bonds in question are within the spirit, of the constitutional inhibition, because in proportion to the amount of them issued by any community, like any kind of debt, they affect the public prosperity and solvency.

In the case of *Dewey v. State*, 91 Ind. 173, is a decision which is not without significance in this connection. Section 4246, Rev. St. 1881, in force since July 2, 1877, requires that no bid for the doing of a county work shall be received or entertained by any board of county commissioners unless accompanied by a bond of prescribed character and conditions. The fifth section of the gravel-road law (Rev. St. § 5095) requires of a contractor, under that law, a bond conditioned simply "for the proper performance of his contract within the time and manner prescribed as the county commissioners may deem expedient." The court in this case holds that section 4246 is applicable to the bond required in section 5095, and that a bond given under the latter section, and containing the conditions required in the former, as well as that specified in the latter, will be enforced in respect to all of the conditions. This is the scope of the decision on this point, as I understand it, and it would seem that the court must

have regarded the construction of free gravel roads under the statute as a county work, and not merely a work for a district done under the supervision of the commissioners.

Some question has been made of the power of the county board to issue bonds, which should constitute a general county liability, "to construct a gravel road for the benefit of and to enhance the value of the lands of A. and B.," or of a particular district. The law, however, requires that the proposed improvement in each case shall be one of "public utility;" and that public highways may be constructed at the expense of the county, or of the district in the vicinity of the work, or of both, according to the legislative pleasure, cannot be doubted.

The further point is made, that, conceding the bonds to be invalid, the plaintiff can have no remedy, especially as it is shown that the money paid by him for the bonds has been mingled with other moneys of the county in the treasury. It is not disputed that if the money of the plaintiff could be identified, he might reclaim it in such a case; and, this being so, the mere commingling of his money with that of the county, while the proper amounts are ascertainable, should not be deemed an obstacle to the granting of relief.

Ordered that the exceptions to the answer be sustained.

**DUNDEE MORTGAGE & TRUST INVESTMENT CO. v. SCHOOL-DIST. NO. 1
and others.**

(Circuit Court, D. Oregon. August 18, 1884.)

1. UNIFORMITY OF ASSESSMENT AND TAXATION—SPECIAL LAW ON SUCH SUBJECT.

An act which provides for the taxation of mortgages on land in no more than one county, there being mortgages on land in more than one county, is void for want of the uniformity required by section 1 of article 9 of the constitution of the state, and also because it is contrary to section 23 of article 4 of said constitution, which forbids special legislation on that subject.

2. TAXATION OF MORTGAGES.

The act of 1882, Sess. Laws, 64, is the first and only act providing for the taxation of mortgages as things or property; but prior to that time a solvent debt, whether secured by mortgage or not, was taxable as personal property.

3. UNCONSTITUTIONAL PROVISION IN ACT.

When an act contains an unconstitutional provision which renders it void, and the act can stand and be executed without it, according to the general purpose of the legislature, such clause may be stricken out by the court, and the act considered as if it had never been inserted; but not otherwise.

4. TAX—ILLEGAL FOR WANT OF UNIFORMITY.

A tax may be illegal for want of uniformity that is the necessary consequence of the law providing for it, or the misconduct of those charged with its administration; but so long as such uniformity is not the direct result of the law it cannot be held invalid on account of it, and the remedy, if any, must be confined to the illegal proceeding under it.

5. STATUTE—WHEN SPECIAL.

A "special" act affects a part only of the subject to which it relates, and whether an act is considered "public" or "private" is not relevant to the question of whether it is "special" or "general."

Suit for an Injunction to Restrain the Collection of a Tax.

William H. Effinger, for plaintiff.

R. S. Strahan and John Burnett, for defendants.

DEADY, J. This suit is brought to restrain sundry tax collectors in this state from enforcing the collection of a tax levied upon sundry mortgages belonging to the plaintiff, under the act of October 26, 1882, commonly called "The Mortgage Tax Law," by the sale of the same. The cause was before this court on an application for a provisional injunction against three of the defendants, then served with a rule to show cause, or appearing thereto, why the same should not be allowed. 19 FED. REP. 359. The application was heard as upon a demurrer to the bill, and upon the affidavit of the defendant Sears. On March 6, 1884, the injunction was allowed upon the ground that the act aforesaid, under which the plaintiff's mortgages were assessed, was void for want of the uniformity required by section 1 of article 9 of the constitution, and because it was passed contrary to section 23 of article 4 of the constitution, which forbids the passage of a "special" act "for the assessment and collection of taxes." Since then, the defendants Sol. King, George Humphrey, J. R. Campbell, H. Holman, and B. Forward have appeared by their counsel, and on May 3d filed a joint demurrer to the bill; and now, by the stipulation of counsel, the issue made by said demurrer is submitted to the court for determination, without further argument for the plaintiff and for the defendants, upon the brief for the respondents in the case of *Crawford v. Linn Co.*, at the March term of the supreme court of the state. The grounds of the demurrer are these: (1) This court has no jurisdiction of the subject of the suit, in that it does not appear that the corporation or stockholders of the plaintiff are citizens or subjects of Great Britain; (2) there is no question arising under the constitution or laws of the United States presented herein; (3) the act of the legislative assembly, referred to in the plaintiff's bill of complaint, is not in conflict with the constitution of the state of Oregon.

As to the first objection the brief is silent. But upon examination of the bill I find that it is not alleged therein, in so many words, that either the plaintiff or its stockholders are citizens or subjects of Great Britain, but only that the former is "resident" of the burg of Dundee, in Scotland. But it is also alleged that the plaintiff is a "foreign corporation duly incorporated under the laws of Great Britain;" and this, in legal effect, is the same as saying that it is a subject of Great Britain. For the purpose of jurisdiction in the national courts, the members or stockholders of a corporation are conclusively presumed to be citizens of the state under whose laws it is created or formed, and in which it has its corporate existence, and a suit by or against such corporation is therefore presumed to be a suit by or against citizens of the state which created it. *O. & M. Ry. Co. v. Wheeler*, 1 Black, 295, and cases there cited; *Cowles v. Mercer Co.* 7 Wall.

121; *Ry. Co. v. Whitton*, 13 Wall. 283. And this rule is upon principle as applicable to corporations formed under the laws of a foreign country, as under the laws of any of the states of the Union, which are, so far, foreign to one another. A corporation formed under the laws of Great Britain is necessarily resident therein, and its members are presumed to be subjects thereof.

The second objection, assuming it to be true in statement, as it is not, is altogether immaterial. The jurisdiction of this court over this controversy is fully authorized by the character of the citizenship of the parties without reference to the subject-matter. The suit being between an alien on the one hand, and citizens of a state of this Union on the other, the court has jurisdiction of the controversy, let the questions involved therein be what they may. Article 3, § 2, U. S. Const. Act of 1875, § 1, (18 St. 470.)

In *Cummings v. Nat. Bank*, 101 U. S. 153, the supreme court took jurisdiction of a suit between a national bank and a county treasurer to restrain the latter from collecting a tax from the former, under the laws of Ohio, on the ground that the bank, being organized under an act of congress, had a right to sue in the national courts, and did restrain the collection of the tax on the ground that it was imposed in violation of the rule of uniformity prescribed by the constitution of the state, in that the stock of the bank was assessed at its full cash value, while the real and other property of the county was deliberately assessed at a much less value.

But there are two questions made in the case that arise under the constitution of the United States, either of which is sufficient, so far, to give this court jurisdiction of the suit, without reference to the citizenship of the parties; and these are: (1) Does the act of 1882 impair the obligation of the contract between the plaintiff and its debtors, contrary to section 10 of article 1 of the constitution of the United States? and (2) said act being unconstitutional and void for want of uniformity, and because the same is special, does not the enforcement of it by the sale of the plaintiff's debts and mortgages so far deprive it of its property without due process of law, contrary to the fourteenth amendment? The first of these questions was answered, on the application for the injunction, in the negative, and the second in the affirmative.

The third objection involves the question of the validity of the act of 1882. The principal point made in the brief under this head, that requires attention, is this: Admitting that the act of 1882, taken by itself, does not provide for a "uniform and equal rate of assessment and taxation" of all mortgages, as required by the constitution, (article 9, § 1,) yet, when considered in connection with the existing law on that subject, and as a part of it, it is not open to that objection. The argument in support of this proposition is substantially this: By the law of 1854, in force when the act of 1882 went into effect, all "personal property," including "all debts due or to be-

come due from solvent debtors, whether on account, contract, note, mortgage, or otherwise," was "subject to taxation in the manner provided by law." Or. Laws, p. 748, §§ 1, 3; Id. p. 752, § 17; Sess. Laws 1876, p. 69. And as the law of 1882 did not include debts secured by two-county mortgages, they continued taxable, notwithstanding, under the old law, at "their true value in cash," as the personal property of the owner in the county where he resides, and therefore there is no want of uniformity in the result. This point was not made on the hearing of the application for the injunction. The argument in support of it is plausible; but, upon careful consideration, I do not think it is sound. The uniformity and equality which the constitution enjoins on the legislature the duty of providing for, is a "uniform and equal rate of assessment and taxation" of all personal property not exempt therefrom. And this requires that all property liable to taxation within the state, county, town, or other taxing district shall be taxed equally; that is, shall be assessed or valued for taxation by the same rule and method, and pay the same rate on such valuation. As was said by the supreme court in *Mumford v. Sewell*, 11 Or. (Daily Oregonian, May 25, 1883), the act of 1882 was the first legislation providing for the taxation of mortgages in this state, and it is confined by its terms to mortgages on land in only one county. It being admitted that there are mortgages on land in more than one county in the state, the law lacks uniformity; and it is not only wanting in uniformity—it does not even profess or seek to obtain it, but the contrary. It does not include, as it should, all mortgages; and it distinguishes between those included and excluded, by a circumstance so irrelevant and adventitious that it can never be the basis of any just or reasonable classification for the purpose of taxation.

Neither is it true, as assumed by the argument for the present defendants, that mortgages are taxed under the old law. That law only applies to solvent "debts," whether "on account, contract, note, mortgage, or otherwise." I know there is a *dictum* in *Poppleton v. Yamhill Co.* 8 Or. 342, to the effect that "notes and mortgages should be regarded as personal property, and subject to assessment for taxes." But the question before the court was simply whether or not the county authorities had acted legally in listing certain "debts" due the plaintiff on note and mortgage for taxation. There was no attempt to assess a note or mortgage specifically as a thing of property, but only the debt or chose in action evidenced thereby; and the phrase, "notes and mortgages," is evidently used by the court to signify the debts which they represent, and which alone the statute made taxable. I think it is common knowledge that the act of 1854 was never understood to include either notes or mortgages as taxable property, but only the solvent debts evidenced by them, and that no mortgage was ever listed as such for taxation in this state prior to the act of 1882. So that, taking the law as it stands, and giving effect to the old law

so far as it is not displaced by the new one, the statute does not provide for the taxation of all mortgages in the state for state purposes, or in any county thereof for county purposes, but only for such as may chance to be on land in no more than one county. But while it is not distinctly asserted in this argument, it is silently assumed by it, that the taxation of a debt under the old law, that happens to be secured by a mortgage, is equivalent to the taxation of said mortgage under the act of 1882. But, if this is so, what occasion was there for the passage of the act? None whatever.

But admitting that the old law, in taxing a debt "due on a mortgage," imposes the same burden on the creditor that it would if it had taxed the mortgage, and that the difference between taxing a debt "due on a mortgage" and taxing the latter for the value of the former is a merely nominal one, still the marked differences in the mode of the assessment, if not the rule of valuation, between the two laws, make it very doubtful whether a mortgage assessed under the one is uniformly and equally taxed with one assessed under the other. A debt or mortgage assessed under the old law is valued by the assessor of the county where the creditor lives. He is selected by the local influence of which the creditor is a part, and subject to all the friendly and favoring impulses and influences which naturally arise out of near neighborhood, common interest, and mutual dependency. And if the creditor is dissatisfied with the action of the assessor, he may appeal to a local board of equalization, easy of access, and subject to the same impulses and influences. And he can pay his taxes in the county where he lives, and have the benefit in his business or property of their expenditure in his vicinity. But in the case of a mortgage assessed for taxation under the new law, all this is liable to be reversed. The mortgage is valued by the assessor of the county where the debtor lives, and the taxes must be paid there. In a word, all the local influences and prejudices which are so liable to affect the assessment of the mortgage and the collection of the tax thereon, are almost certain to operate unfavorably to the absent and voteless creditor. Taking human nature as we find it, it is morally certain that one and two county mortgages will not be uniformly and equally assessed and taxed under circumstances and influences so diverse as these. But it may be that these inequalities are not the necessary result of the law, and are directly attributable to its maladministration or human infirmity, and therefore it cannot be held unconstitutional on account of them. As was said by Mr. Justice MILLER in *Cummings v. Nat. Bank*, *supra*, 161, the doings of those charged with the administration of the statute may be unlawful, while the law itself is valid; as where the law requires all property to be assessed at its true cash value, and the officers of a county charged with the administration of this law purposely and generally assess certain property—for instance, the land—at half its cash value, and certain other property—for instance, mortgages—at par or their full cash value.

This want of uniformity cannot be charged to the law, but to the misconduct of those who administer it; and the remedy, as was held in *Cummings v. Nat. Bank*, *supra*, is not against the law, but its illegal administration. In such case the owner of the mortgage may have the collection of one-half the tax levied on his mortgage judicially restrained, and thereby secure uniformity in the taxation of the land and mortgage. Yet it is apparent that the legislature does not obey the spirit of the injunction of the constitution when it provides for the taxation of mortgages in a manner which, while it is uniform and just in letter and form, will, as every one at all conversant with the subject knows, result otherwise in practice.

But mortgages which are assessed in different counties are also liable to pay different rates of local taxation. For instance: A. lives in Clackamas county and owns a mortgage on land in Yamhill and Polk counties. Being a two-county mortgage, it is assessed to him in Clackamas county, if at all, and pays the county road and school tax levied in that county. B. lives in the same county, and owns a mortgage on land in Yamhill county. Being a one-county mortgage, it is assessed and pays taxes in the latter county; and it is therefore morally certain that it will pay a different rate of local taxation from A.'s mortgage on land in the same county. For this want of uniformity, supposing that two-county mortgages are taxable at all, I think the law must be held responsible. The fault is the necessary result of the law and not its administration. The difference in the rate of local taxation in the several counties of the state is as well known as the difference in their size, and is as inevitable as the difference per acre in the yield of grain within their borders. And still, until it appears that the local rate is greater instead of less in Yamhill than in Clackamas, B. may have no right to complain of this want of uniformity, because he is not injured by it.

But, waiving these suggestions, I see no reason to conclude that there is or ever was any law of this state providing for the taxation of mortgages except the act of 1882, and that is expressly limited to mortgages on land "in no more than one county," and is therefore void for want of uniformity.

But it is also claimed in defendant's brief that admitting the act of 1882 "exempts" two-county mortgages from taxation, the exemption is void and the law valid; citing *People v. McCreery*, 34 Cal. 432; *People v. Gerke*, 35 Cal. 678, and *People v. Black Diamond Coal M. Co.* 37 Cal. 54. The latter two cases merely affirm the decision made in the first one. In that the court held, reversing the cases of *People v. Coleman*, 4 Cal. 46, and *High v. Shoemaker*, 22 Cal. 363, that under the constitution of the state, which requires that "taxation shall be equal and uniform throughout the state," and that "all property in the state shall be taxed in proportion to its value," the legislature had no power to exempt private property from taxation. By the general revenue act, then (1867) in force, it was provided that "all prop-

erty of ever kind and nature whatever within the state shall be subject to taxation, except" certain property therein specified, as mining claims and growing crops. The defendant resisted the collection of a tax levied under this law on property not within the exemptions, on the ground that the whole act was unconstitutional and void on account of the exemptions. But the court held that the exemption being void was no part of the act, and that it must be read as if that provision had not been inserted in it. To have held otherwise would have left the state wholly without a revenue act or revenue, and doubtless the argument *ab inconvenienti* had weight with the court. But that is not this case by any means. The act of 1882 does not deal with two-county mortgages, nor "exempt" them from its operation; it relates simply to one-county mortgages; and if two-county mortgages are not affected by it, it is not because it exempts them from its operation, but for the reason they are not included in it. It is a case, then, not of an illegal "exemption," but an "omission" or failure to provide. If the act had expressly or in effect first provided for the taxation of all mortgages, and then declared that two-county mortgages should be exempt from its operation, the case would be parallel with *People v. McCreery*. And upon the law of that case the court might declare the exemption void, and thus leave the act to have effect according to its terms upon all mortgages. But in a case like this, where the unconstitutionality of an act arises from an "omission" rather than an insertion, there is nothing to strike out or declare void, unless it be the whole act. A court may declare a clause in an act invalid and leave the act to stand without it, if the operation does not nullify or render nugatory what remains; but it cannot put words into an act which the legislature has omitted—and, presumably, designedly so—for the purpose of making it valid. That would be legislation—making the law rather than declaring it. In other words, the power to strike an unconstitutional clause out of an act is a very different thing from the power to insert one in an act to make it constitutional. The one is judicial, the other legislative.

But it is also suggested in the brief for the defendants that the words of description or limitation—"in no more than one county"—by which the operation of the act is restrained or confined to one-county mortgages, may be stricken out as unconstitutional, and then the act would in terms apply to all mortgages, and therefore not be obnoxious to the charge of the want of uniformity. But that would defeat the purpose of the legislature, which was to tax one-county mortgages and no other. Besides, the method of proceeding under the act is not adequate to the assessment of two-county mortgages, and therefore it could not be enforced against them, and would still remain what the legislature intended it should be—an act for the taxation of one-county mortgages. The act would still contain the positive direction (section 2) that a mortgage for the security of a debt shall be assessed in the county where the land lies; and this

itself would prevent the application of the act to a mortgage upon land in more than one county.

But, passing the question of uniformity, this act is clearly void because it was passed in violation of section 23 of article 4 of the constitution, which expressly forbids the passage of a "special or local" law "for the assessment and collection of taxes." It is not necessary to add to what was said on this subject in the former opinion, as the brief only refers to *Allen v. Hirsch*, 8 Or. 412, which I regard as overruled by *Manning v. Klippel*, 9 Or. 367, so far as it decides that a public statute cannot be a "special or local" one within the meaning of section 23 of article 4 of the constitution of the state. A "special" act relates to a part and not the whole,—as one-county mortgages, and not all mortgages; and whether it is also considered a "public" or "private" one, is altogether immaterial and irrelevant. Under the constitution of this state all statutes are "public" ones, unless otherwise declared in the body of the act. Art. 9, § 27, Or. Const. If an act is not a "special" one because it is also a "public" one,—that is, an act of which courts take judicial notice,—then every prohibition contained in the constitution against special legislation may be violated with impunity. According to this idea, if the law is "public" it is not special. But the constitution makes it public, however special in its nature or operation, unless the legislature otherwise declare. So, as there can be no special law, according to this theory, unless the legislature declares it private, it is not likely that when it undertakes to pass an act upon subjects forbidden to special legislation that it will take the trouble to declare it private, and thus subject it to the risk of being declared unconstitutional. But undoubtedly, under the constitution of the state, an act may be both "public" and "special or local," and the presence of one of these qualities in no way implies or excludes the other. An act cannot be both "public" and "private," but it can be either and be special.

The brief for the defendants also contains the statement, much circulated at the time the provisional injunction was allowed, to the effect that the supreme court in *Mumford v. Sewell*, *supra*, had decided that the act of 1882 is not in conflict with the constitution of the state, and this court had disregarded such decision, and held the act void notwithstanding. Now, the fact is, the court, in *Mumford v. Sewell*, did not hold the act constitutional any further than as follows: (1) It was passed by the legislature according to the form prescribed by the constitution; (2) the legislature has power to provide for the taxation of mortgages; and (3) the act does not impair the obligation of the contract between the mortgagor and mortgagee. The first of these rulings was followed by this court of course, without comment, and the second with express approbation. The third ruling was concurred in, but, as the question involved is a federal one, it was decided by this court for itself. The question of uniformity, upon which this court held the act void, was not presented to the state court, or de-

cided by it. If it had been, this court would have followed it, of course.

To intelligent and fair-minded persons this explanation of so plain a matter may seem superfluous. But the statement that this court had wantonly and arbitrarily disregarded a decision of the supreme court of the state on a question of local law, has been so positively and persistently made, that I deem it but just to myself, and the court in which I have the honor to sit, to correct it.

It is hardly necessary to add that in all my action in this matter I have not been influenced by any desire to promote or prevent the taxation of mortgages, but only to ascertain and determine the rights of the parties to this suit under the laws and constitutions of the country.

The demurrer is overruled, and the defendants have 10 days, as provided in the stipulation, in which to answer the bill.

BAGLEY and others v. CLEVELAND ROLLING MILL Co.

(Circuit Court, N. D. New York. July 26, 1884.)

1. SETTING ASIDE A VERDICT—CAUSE—TEST.

If the evidence introduced during the trial of a case was such that it would have been the duty of the court to set aside a verdict in favor of a defendant as contrary to the evidence, if such verdict had been rendered by the jury, then it was the duty of the judge to direct a verdict for the plaintiffs.

2. SALE—WARRANTY—EXPRESS AND IMPLIED—RIGHT OF ACTION.

The rights and remedies of a purchaser are not affected by the question whether a cause of action arises out of a breach of a contract by the vendor to deliver an article of a specified quality, or out of a breach of a representation which is collateral to the contract, or out of such a breach when the representation or warranty is implied instead of being express.

3. SAME—LIABILITY—DUTY OF VENDEE.

A manufacturer of steel having, in obedience to several orders from a customer, furnished the latter with steel of a certain quality, if, upon receipt of a subsequent order from the same customer for the same article, he supplies an inferior quality, he is liable upon his undertaking that the steel was of the quality ordered, and such liability is not lessened by the fact that the customer did not avail himself of his opportunity to test the steel before using it.

4. SAME—QUALITY—LEGITIMATE PRESUMPTION.

If there is a warranty of kind and quality, the purchaser has a right to assume the warranty to be true, and therefore he may sell with like warranty, and defend suits for the breach, and recover of the vendor.

At Law.

Charles D. Wright and Francis Kernan, for plaintiffs.

Levi H. Brown and Beach & Cushing, for defendant.

WALLACE, J. If the evidence introduced upon the trial of this case was such that it would have been the duty of the court to set aside a verdict in favor of the defendant as contrary to evidence, if such verdict had been rendered by the jury, then it was the duty

of the court to direct a verdict for the plaintiffs. *Randall v. B. & O. R. Co.* 109 U. S. 478; S. C. 3 Sup. Ct. Rep. 322; *Griggs v. Houston*, 104 U. S. 553; *Herbert v. Butler*, 97 U. S. 319.

The defendant's motion for a new trial presents the question whether the evidence was such as to require the case to be submitted to the jury according to the rule stated. The plaintiffs sued to recover damages arising from a breach of warranty on the part of the defendant. The plaintiffs were manufacturers and sellers of vises at Watertown, New York, and the defendant was a manufacturer of steel at Cleveland, Ohio. In August, 1880, the plaintiffs wrote to defendant, stating that they required steel for facing the jaws of the vises they were manufacturing, and detailing the characteristics which steel should possess for that purpose, and requesting defendant to send them a sample to test. The defendant sent them a sample. It proved unsatisfactory, and plaintiffs wrote defendant again, pointing out the defects, asking for another sample, and stating that they could give considerable and continuing orders if defendants could furnish a satisfactory article. The defendants sent other samples. Subsequently, the plaintiffs sent several orders for lots of steel, accompanied with explanatory suggestions to defendant, and defendant sent the lots ordered. The correspondence indicates that it was contemplated by both parties that plaintiffs should experiment with these lots, in order to ascertain whether the defendant could supply them with the required article. October 22, 1880, defendant wrote plaintiffs as follows:

"We have been trying to get a cast of steel out for your work, but are so busy that we can't do anything in way of experimenting, but will send same as before if desired. If you desire us to send same quality as before please reiterate your order."

October 25th plaintiffs replied to this letter as follows:

"Yours of 22d at hand. Give us same quality as last lot, and send, as soon as possible, 500 lbs. $\frac{1}{2} \times \frac{3}{4}$, 500 lbs. $\frac{5}{8} \times 1$, 500 lbs. $\frac{5}{8} \times 1\frac{1}{4}$."

November 6th plaintiffs wrote defendant again as follows:

"Send us 500 lbs. steel, (same quality,) $\frac{3}{4} \times 1\frac{1}{4}$. We are in great need of all stock ordered, and if it proves satisfactory on a fair trial hope to give you much larger orders."

Neither of these orders were filled by defendant, owing to defendant's inability to do so, and November 20th defendant wrote plaintiffs explaining the causes of the delay. November 22d plaintiffs wrote defendant, referring to their former orders, and ordering two more lots of 1,000 pounds each. Soon after this all the orders were filled by the defendant, and after they were filled, and prior to March 5, 1881, plaintiffs ordered and defendant sent four or five lots of steel. March 5, 1881, plaintiffs ordered 2,000 pounds, "same quality as last ordered," which order was filled by defendant. March 30, 1881, plaintiffs ordered three tons, "same quality as last." This order was filled by defendant by a shipment of the quantity, April 30th.

All the lots sent by the defendant between November 22, 1880, and this last order, including the steel sent upon the order of March 5th, proved satisfactory to the plaintiffs, but the steel sent to fill the order of March 30th proved a failure. Its defects were discovered before it was used, and May 13th plaintiff wrote to defendant as follows:

"The steel shipped by you April 30th is a complete failure. You remember we want it for vise jaws, and require it to harden and take a temper when heated and plunged in water. What you have sent before has been good and satisfactory in this respect. We have tested some 20 or 30 pieces, and many took no temper at all, and some would harden in spots and be soft in other parts. We have tried it faithfully in every way, with no better results. Of course, we cannot think of using it, as the tempering is the last process, almost, after all the work is expended on the vises. We see no other way than for you to duplicate the order with stock that will be right, and we return this lot to you."

May 17th defendant wrote to plaintiffs:

"We have investigated the complaint contained in your letter of the 13th against the steel, and find that, through a misunderstanding here, we did not send the right thing. We have entered a new order and will push it as fast as possible. Meanwhile, please return the lot you have to us."

May 21st plaintiffs wrote defendants, stating that they had shipped the lot for return, and saying:

"We trust you will permit no delay in forwarding the duplicate order of proper quality. We are out of stock, and many of our men will be idle until it arrives."

May 24th defendant filled the order. The lot was received by plaintiffs, June 1st, and a large part of it was used for the vises. After it had been used and the vises sold, complaints were made by purchasers, and, upon investigation, it was ascertained that the vise jaws made from it were too brittle for practical use. Thereupon, tests were made of the unused steel, part of the lot in question on hand, and it was found wholly unfit. These tests were made by taking samples of the lot and heating them, and plunging them in water, when, by filing and by striking them with a hammer, it was found they had not tempered, but were brittle. Thereupon, plaintiffs promptly gave notice to the defendant, and sent to the defendant samples of the steel to test. After a long delay defendant's agent wrote to plaintiffs stating that he was satisfied that defendant could not make steel of the kind required for the plaintiff's purposes.

The damages sustained by plaintiffs in the cost of labor and the waste of material employed in the defective vises, together with interest from the commencement of the suit, were \$3,000.

The court ruled, as matter of law, that there was an agreement on the part of defendant that the steel should be of the same quality as the lots that defendant sent to the plaintiffs between November 22, 1880, and the lot sent upon their order of March 30th; that there was a breach of this agreement; that the plaintiffs owed no duty to

defendant to test the steel before using it; and that there was no evidence to authorize the jury to find that the plaintiffs or those in their employ discovered the steel to be defective before the vises were finished. If these rulings were correct the motion for a new trial should be denied.

There was no conflict of testimony respecting the warranty. The plaintiffs' letter to defendant of March 5, 1881, requested the defendant to send steel of "the same quality as last ordered." The defendant sent that lot of steel. March 30th plaintiffs ordered three tons more, "same quality as last." The defendant undertook to fill that order, but failed for the reason stated in its letter to plaintiff of May 17th: "through a misunderstanding here we did not send the right thing." The defendant then made a second attempt to fill the order, and this after being advised by plaintiffs' letter of May 13th what the particular defects were, and what use the steel was required for, and that the steel sent before was satisfactory. There was, therefore, no room for any possible misconception or misunderstanding of the description and quality of the steel which the defendant was instructed to send. The question, then, is, did the transaction import an undertaking upon the part of the defendant to send plaintiffs steel of the quality theretofore sent, and found to be satisfactory?

Although the term "warranty" is used as expressing, in a general sense, the nature of the defendant's undertaking, there was no warranty in the technical sense of the term. A warranty is an undertaking which, though part of the contract of sale, is collateral to the express object of it,—a buyer has a right to expect an article answering the description in the contract; but this is not on the ground of warranty, but because the seller does not fulfill the contract by giving him something different. ABINGER, C. B., in *Chanter v. Hopkins*, 4 Mees. & W. 399, 404; MARTIN, B., in *Azemar v. Casella*, (Exch. Cham.) L. R. 2 C. P. 677, 699. Such an undertaking is usually treated as a warranty, because the description of the article is deemed a representation that it answers the description. But where there is a collateral representation the rule obtains that, in order to constitute a warranty, it must have been intended as such by the vendor, and understood as such by the vendee.

By assuming to comply with the plaintiffs' order, the defendant undertook to send steel of the same quality as that furnished upon their order of March 5th. The order of March 30th was the one which defendant assumed to fill, and called for steel of the same quality as sent in response to the order of March 5th. The letters and orders of plaintiffs, subsequently, were but reiterations of the original instruction to send steel of the same quality as sent upon the order of March 5th. There was nothing for the jury to pass upon, and the question was one purely of law, whether defendant undertook to furnish plaintiffs with steel like that sent pursuant to the

former order of March 5th. That they did so undertake is perfectly clear. The case, in its facts, is almost identical with *Gurney v. Atlantic & G. W. R. R.* 58 N. Y. 358. The rule that the sense in which an affirmation is intended, and whether it was understood and relied on as a warranty, are questions of fact for the jury, has no application to such a case, (*Wason v. Rowe*, 16 Vt. 525,) any more than to the case where an article is sold by a particular description. *Hogins v. Plympton*, 11 Pick. 100; *Winser v. Lombard*, 18 Pick. 60; *Borrekens v. Bevan*, 3 Rawle, 23; *Richmond Trading Co. v. Farquar*, 8 Blackf. 89; *Hawkins v. Pemberton*, 51 N. Y. 204; *Donce v. Dow*, 64 N. Y. 411. Where a vendor agrees to fill an order sent for an article of a particular quality, his liability is the same as when the proposition to sell an article of that description comes from him in the first instance; he is liable if the goods sent do not correspond with the description. *Dailey v. Green*, 3 Har. (Pa.) 118.

The evidence was so conclusive that there was a breach of the undertaking of the defendant, that the jury would not have been authorized to draw a contrary inference. If all the steel had been used there might have been a slight question whether or not some fault or error in working it had not been committed by the plaintiffs, although the testimony in their behalf was clear and uncontradicted that they used ordinary care in working it; but the tests made with the steel which had not been used, the entire absence of testimony on the part of the defendant tending to attribute the result to any other causes than the defective quality of the article, and defendant's subsequent implied admission of its defective quality, left the case of the plaintiffs free from any fair doubt.

If the plaintiffs had a right to rely upon the undertaking of the defendant that the steel was of the quality ordered, the latter certainly has no right to complain because the plaintiffs acted upon that assumption. If there is a warranty of kind or quality, the purchaser has a right to assume the warranty to be true, and therefore he may sell with like warranty, and defend suits for the breach, and recover of the vendor his special damages in consequence of doing so. *Clare v. Maynard*, 7 Car. & P. 741; *Cox v. Walker*, Id. 744; *Swett v. Patrick*, 12 Me. 9; *Ryerson v. Chapman*, 66 Me. 557; *Lewis v. Peake*, 7 Taunt. 153.

The testimony undoubtedly shows that up to a certain period in the dealings between the parties it was not certain that the defendant could supply plaintiffs with the desired quality of steel, and that plaintiffs were experimenting to ascertain whether the article sent would answer the purpose. But after the plaintiffs had informed defendant that certain lots had proved satisfactory, and gave an order for the same quality, the latter had no right to assume that future experiments would be made. After their letter of November 6th there was nothing on the part of the plaintiffs to indicate their intention to make experimental tests. It is true that by their letter of May 16th

the plaintiffs notified defendant that they had found the lot shipped pursuant to their order of March 30th unfit before using it, but the defendant was aware that this was not owing to any inherent difficulties in the article, but to its own fault in not sending the kind sent before, and by acknowledging its mistake plainly intimated to plaintiffs that it could supply the required article.

It is held in several cases by the courts of New York that upon an executory contract for the sale and delivery of personal property the remedy of the vendee to recover damages, on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the article by the vendee after opportunity to ascertain the defect. *Hargous v. Stone*, 5 N. Y. 73; *Reed v. Randall*, 29 N. Y. 358; *Dutchess Co. v. Harding*, 49 N. Y. 321.

The later cases in the same courts establish quite decided modifications of the doctrine.

In *Gaylord Manuf'g Co. v. Allen* the court say:

"It is not intended to express an opinion as to the rule in case there were latent defects, or those which could not be discovered at the time of the delivery or the acceptance of the article." ALLEN, J., 53 N. Y. 519.

In *Gurney v. Atlantic & G. W. R. Co.*, *supra*, it is held not to apply when the defects cannot be ascertained by examination, upon receipt of the article, but only upon use.

In *Day v. Pool*, 52 N. Y. 416, and *Park v. Morris Ax & Tool Co.* 54 N. Y. 587, the court held that where there is an express warranty upon an executory contract of sale, the vendee is not bound to return, or offer to return, the article; but after acceptance, and after the discovery of its defects, may retain it and recover upon the warranty.

In the cases of *Hargous v. Stone* and *Reed v. Randall* the defects in the article accepted by the vendee were obvious upon inspection, and, if the rule is confined to such cases, it is supported by some of the earlier English decisions, and by *Sprague v. Blake*, 20 Wend. 61. The question is not much considered in *Hargous v. Stone*, but in *Reed v. Randall* the authorities are considered, and the cases of *Fisher v. Samuda*, 1 Camp. 190; *Grimaldi v. White*, 4 Esp. 95; *Milner v. Tucker*, 1 Car. & P. 15; and *Sprague v. Blake*, *supra*, are cited as holding that the remedy of the vendee does not survive the acceptance of the article, after opportunity to ascertain the defect. The English cases were similar in their facts to *Sprague v. Blake*,—cases where the defects were obvious upon inspection of the article accepted. Some of the early English cases hold that the rule does not obtain where there is an express warranty; but Lord ELLENBOROUGH did not make such a distinction, and applied it to such a case in *Hopkins v. Appleby*, 1 Starkie, 477. Modern text writers of high authority do not adopt the unqualified proposition that the cause of action does not survive an acceptance, after knowledge that the article is not in compliance with the condition of sale, but state that the silence of the vendee, after acceptance with knowledge of the breach of the contract, may

be interpreted as a waiver of a right to complain, and may afford a presumption that the article was satisfactory. Story, Sales, § 405; Benj. Sales, §§ 825, 829.

The law was stated by COMSTOCK, J., in *Muller v. Eno*, 14 N. Y. 597, as follows:

"The omission of the purchaser to give notice or to make complaint, and the manner in which he deals with the goods, may furnish strong presumption against him upon the question whether the warranty is in fact broken, and in regard to the amount of injury he has sustained. But this is a very different thing from saying that the law absolutely deprives him of relief."

Undoubtedly, acceptance after knowledge precludes the vendee from exercising the right to rescind the sale, and the cases of *Day v. Pool* and *Park v. Morris Ax & Tool Co.* place the rule upon its correct foundation in this respect.

Manifestly, there is no distinction in principle, as to the rights and remedies of a purchaser, between a cause of action arising out of a breach of contract by the vendor to deliver an article of a specified quality or description, or out of the breach of a representation which is collateral to the contract, or out of such a breach when the representation or warranty is implied instead of being express. In either case there is an agreement, in substance and purport, to the same effect; in either, a breach of it works the same injury to the vendee; and in either, the same presumption of fact arises from an acceptance of the article after discovery of its defects. Whether the cause of action is for a breach of a contract or for the breach of a warranty is a mere matter of nomenclature, (*Hastings v. Lovering*, 2 Pick. 214;) and the breach of a promise implied by the law works the same consequences, imposes the same obligations, and creates the same rights, as the breach of an express promise. The language of the court in *Woolcott v. Mount*, 36 N. J. 262, is apposite, and is accepted as a sensible and satisfactory exposition of the law, and is as follows:

"The obligation rests upon the contract. Substantially the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty; but when his situation has been changed, and the remedy by repudiation has become impossible, no reason supported by authority can be adduced why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial."

The defective quality of the steel received by the plaintiffs was not obvious upon inspection, and as the fault was a latent one, their acceptance and use of it is not material, either upon the theory that their cause of action did not survive the acceptance, or that their conduct starts the presumption that it was a satisfactory article. Undoubtedly, the plaintiffs could have discovered the latent defects in the steel here if they had made a thorough test by heating and plung-

ing it. The question, however, is not what they could have discovered, but what they did discover, and upon that question the testimony is decisive. Acting upon the assumption that the defendant had sent them the article ordered, there was probably a relaxation of their usual vigilance in testing its quality, but not a *scintilla* of evidence to show or raise the inference that they were aware of its defects until after it had been used, and the vices in which it had been used had been sold in the market.

The damages sustained by the plaintiffs were such as it was reasonably to be anticipated by the parties would accrue, in view of the special use to which the plaintiffs were to apply the steel if it proved to be unfit for the purpose. They ensued as the natural and ordinary consequence of the use of the steel in the manner contemplated by both parties. Upon the authority of many analogous cases the plaintiffs were entitled to recover to the whole extent of their actual loss. *Hadley v. Baxendale*, 23 L. J. Exch. 179; *Smeed v. Ford*, 102 E. C. L. 612; *Passinger v. Thorburn*, 34 N. Y. 634; *Flick v. Wetherbee*, 20 Wis. 392; *Van Wyck v. Allen*, 69 N. Y. 62; *White v. Miller*, 71 N. Y. 118.

It is undeniably true that when a party who is entitled to the benefit of a contract can save himself from a serious loss arising from a breach of it by reasonable exertions, he will not be permitted to charge the delinquent with damages which arise in consequence of his own inactivity. *Warren v. Stoddart*, 105 U. S. 229. Good faith and good logic require that he be confined to a recovery of those damages only that arise from the default of the other party. If the plaintiffs here had had any just reason to suppose that the steel they were about to use was unfit for the purpose, they would not be permitted to shut their eyes to the probable consequences, and when they proved disastrous to fall back upon the defendant for indemnity. But they are not to be deprived of compensation to the extent of their loss upon the theory that they owed any active duty of investigation and experiment to the defendant. They had a right to assume that the steel sent them was what the defendant undertook to send them, and no implication of negligence on their part can be indulged, in the absence of testimony to indicate that its unfitness was observed before it was used. None was offered, and the case rested on the uncontradicted testimony of the employes of the plaintiffs, all of whom testified that no defects were noticed during the process of using the steel.

Upon the whole case the conclusion is reached unhesitatingly that the defendant cannot fairly complain of the rulings at the trial. There were no disputed facts, and no disputable inferences from the facts shown upon which a verdict for the defendant, or a recovery of a less amount of damages, would have been warranted; and it would have been the duty of the court to set aside such a verdict if it had been found by the jury.

The motion for a new trial is denied.

BAY STATE SILVER MINING CO. v. BROWN.

(Circuit Court, D. Nevada. August 11, 1884.)

1. PLEADING—SUFFICIENCY OF ANSWER.

An answer which clearly puts in issue the material allegations of the complaint is sufficient. It need not controvert immaterial matter.

2. MINING LAW—ADVERSE CLAIM.

In a suit brought under Rev. St. § 2326, to determine the right of possession to an adverse mining claim, the title of each party to the disputed premises is brought in question, and each party must make proof of his title thereto before he can ask a judgment in his favor.

3. SAME—BETTER TITLE.

In such suit the better title must prevail, and judgment be for the party establishing that better title.

4. SAME—FAILURE OF PROOFS.

Where neither party establishes title to the ground in controversy, judgment cannot be for either party, and the suit must be dismissed.

5. SAME—PRESUMPTIONS OF FACT.

In suits of this nature no presumptions of fact as to title arise. Title, right of possession, or forfeiture are facts to be established by the evidence.

Suit to Determine Right of Possession to Adverse Mining Claim.
The opinion states the facts.

Thompson Campbell and R. M. Clark, for complainant.

A. C. Ellis, for defendant.

SABIN, J. This suit was brought under Rev. St. § 2326, to determine the right of possession between plaintiff and defendant to certain mining ground situate in Bristol mining district, Lincoln county, Nevada, described in the complaint. On the seventh of October, 1882, defendant filed in the proper land-office an application for a patent for the Ida May lode, situate in said Bristol mining district. Notice of such application was duly published as by law required. Within the period of publication of said notice, plaintiff, by its superintendent, filed in said land-office a protest against the issue of a patent for said Ida May lode to defendant, on the ground of a conflict between said claim and the Bay State mine, the alleged property of plaintiff. Hence this suit. It was begun in the proper state court, and by plaintiff removed to this court.

There was not a line of testimony submitted to the court tending to establish either plaintiff's or defendant's title or right of possession to the mining ground in controversy. The complaint alleges that "prior to the twenty-fifth day of August, 1881, the plaintiff was, and ever since has been, and now is, the owner (subject only to the paramount title of the United States) and in the possession, and entitled to the possession, of that certain mining claim * * * known and called the Bay State mine, and located on the second day of February, A. D. 1871, and duly recorded," etc. The defendant, by his answer, "denies that said plaintiff was upon the twenty-fifth day of August, 1881, or for a long time prior thereto, or that it ever since has been

or now is, either the owner or in the possession, or entitled to the possession, of that certain mining ground and claim situate * * *, known and called the Bay State mine, as alleged in said complaint." The answer further denies the material averments of the bill, and claims title and possession of the ground in dispute in defendant, by virtue of a lawful location thereof, made by him August 25, 1881.

It is contended by plaintiff's counsel that this denial, above quoted, is insufficient, and that it virtually admits plaintiff's title and right of possession to said mining claim and ground; and that such admission renders unnecessary any proof on the part of plaintiff of its title or right of possession thereto, and hence no evidence was offered thereon. I cannot agree with counsel in this position. The denial is as broad as the averment in the complaint, and this is all that can be required of the defendant. The alleged fault in this denial is—*First*, that it does not deny that the Bay State mine was located in 1871; and, *secondly*, that it does not deny that plaintiff ever owned or was ever in possession of such mine or mining claim. As to the first alleged fault, it is wholly immaterial whether or not the Bay State mine was first located in 1871; as to the second, defendant was not called upon to deny that plaintiff had *ever* owned or ever was in possession of the same. The issue joined was as to the ownership and right of possession to that mining claim on the twenty-fifth day of August, 1881, and the subsequent and present ownership thereof. On this issue there is no ambiguity in defendant's answer; and upon the trial plaintiff was put upon its proof of title and right of possession thereof. And, on the other hand, defendant was equally put upon proof of his title to the Ida May lode before he could ask a decree in his favor adjudging him to be the owner thereof. In suits of this nature the better title must prevail, and judgment must be for the party establishing that better title. A mining claim, until patent therefor has been issued, is held by peculiar title,—a title which is never complete and absolute, and which can only be maintained by the annual expenditure thereon of the work by law required. Plaintiff may have owned the Bay State mine in 1871, but this would not be evidence of its ownership thereof on the twenty-fifth of August, 1881, or subsequent thereto. Forfeiture or abandonment may have arisen during that interval. On this point no presumptions arise; and, on the other hand, none arise that the title has been maintained by the expenditure of the requisite work upon the claim. These things are to be shown, on the one hand or the other, by satisfactory proof. They are facts to be established by the testimony submitted.

A claimant of mining ground, until he has secured patent therefor, must be an actor, and must annually perform the required work thereon, and, in establishing title thereto, must show compliance with the law in this respect. Nothing of the kind is shown by either party in this suit, and it seems to come clearly within the principle announced in *Jackson v. Roby*, 109 U. S. 440; S. C. 3 Sup. Ct. Rep. 301.

In that case, it appeared that neither party had done the requisite work upon the ground in controversy, and neither party was adjudged to have title thereto. In this case, it is not shown that either party has title to the ground in dispute, and the suit must be dismissed for want of proof.

The deposition of M. D. Howell shows that in 1880 he was at work on the Bay State mine, either for or with the permission of plaintiff. This is controverted by the joint affidavit of defendant, Thomas Saunders, and P. F. Kelly, (the latter disinterested witnesses,) filed in the land-office, and submitted with the deposition of the register of the land-office, taken by defendant. Aside from the deposition of Howell, no evidence is submitted to the court as to the title or right of possession of either party to any portion of the land in dispute, excepting the record of defendant's application for a patent for the Ida May lode, and accompanying exhibits, filed in the land-office, and plaintiff's protest thereto, with exhibits annexed. These records are purely *ex parte* matters on either side, prepared for the land-office, and in nowise competent proof of the issues involved in this suit.

The view taken of the case renders it unnecessary to consider several points urged by defendant against the maintenance of the suit.

The bill must be dismissed, with costs to defendant; and it is so ordered.

HUGHES v. DUNDEE MORTGAGE & TRUST INVESTMENT Co.

Circuit Court, D. Oregon. August 8, 1884.

1. IMPLIED CONTRACT.

Whenever one person does work or service for another with his consent, and there is no agreement as to compensation, the law implies a contract to pay what the same is reasonably worth; but when the circumstances of the case clearly repel the idea that the work or services were done with the expectation of payment being either made or received, no such contract will be implied.

2. CASE IN JUDGMENT.

The plaintiff acted as attorney for the defendant and amalgamated corporations engaged in loaning money in Oregon and Washington, under written instructions as to his duties and responsibilities. It was his duty to examine titles to real property offered as security for loans, for which he was permitted to charge the borrowers specific fees. He was also to aid and advise the corporations generally in all matters affecting their interests, but for this service no compensation was expressly provided. The fees received from borrowers were no more than a reasonable compensation for the services rendered them. Under these circumstances the plaintiff acted as the sole and general counsel and adviser of the corporations for some years, without making any charge or rendering any account of his services, or receiving any intimation from the corporations that they did not expect to pay him for them. Upon being sued to recover the reasonable value of these services, the corporations claimed that it was "understood" that the plaintiff was to perform these services gratuitously, or in consideration of the fees received from borrowers. *Held*, (1) that the mere understanding of either party to the contract was no part of it, and did not bind the other, and that there was nothing in the circumstances of the case, or the conduct of the parties, sufficient to prevent or repel the legal implication of a

promise by the corporations to pay the plaintiff what his services were reasonably worth; and (2) that the plaintiff, not having kept any account of his services, and being unable to prove any specific items, ought not to recover more than a reasonable annual retainer therefor.

Action to Recover Money for Legal Services.

George H. Williams and Charles B. Bellinger, for plaintiff.

William H. Effinger, for defendants.

DEADY, J. This cause comes before the court on exceptions by both parties to the report of the referee. It was commenced on February 12, 1883, to recover the sum of \$21,255 for professional services as an attorney and counselor at law. It was tried by the referee upon an amended complaint, in which the sum demanded was reduced to \$19,155, and an amended answer and the replication thereto. From these, it appears that prior to the commencement of this action the Oregon & Washington Trust Investment Company, the Oregon & Washington Mortgage Savings Bank, and the Dundee Mortgage & Trust Investment Company were each foreign corporations, formed under the laws of Great Britain, and engaged, among other things, in the business of loaning money in Oregon and Washington upon note and mortgage, with a principal office at Dundee, Scotland, and a common local office, board, and manager at Portland, Oregon; that the plaintiff was the attorney for these corporations in this country for the periods following: for the first one, from January 1, 1876, to January 1, 1880, when it was amalgamated with the latter; for the second one, from July 1, 1876, to July 17, 1881, when it was amalgamated with the latter; and for the latter, from January 1, 1880, to July 17, 1881; that by the terms of his employment the plaintiff was required to examine and pass on the title to any real property offered as security for a loan, and certify the result to the local manager, and to prepare and have properly executed and recorded all notes and mortgages taken by the corporations, for which service he was to receive a certain percentage on each loan, to be paid by the borrower; and generally to aid and advise in any matter of interest to the corporations. It is on account of services rendered under this latter provision that this action is brought, less the sum of \$756.80 for fees earned in foreclosing two of said mortgages for the defendant.

By the amalgamation of the two elder corporations with the defendant, it is admitted that it succeeded to their rights and assets, and became liable for any valid claim or indebtedness against either of them.

It is not alleged in the complaint that there was any express agreement to pay a fixed or any price for these general services, but only that they were rendered at the request of the corporations, and that their reasonable value is the sum sued for. In reply to a demand for a bill of particulars, the plaintiff filed a statement to the effect that he could not furnish an itemized account; that he was the gen-

eral attorney and counselor of these corporations during the period charged for, and the sole legal adviser of their local manager; that he was consulted almost daily by said manager on the business and affairs of the corporation, but made no current charge therefor, expecting to be paid a gross sum per annum, to be thereafter agreed on by the parties.

It is alleged in the answer that it was "understood and agreed" between the parties that the plaintiff was not to receive any compensation for his services from any of these corporations, but "was to render, without charge, such general advice as might be desired by either of said corporations," in consideration of the fees he received from borrowers. The answer admits the plaintiff's services in foreclosing the mortgages as alleged, and also the value of them, but avers that by special agreement they were to be paid out of the proceeds of the sale of the mortgaged premises, after the payment of the debt due the corporation, and that the defendant was obliged to bid in the property sold in said foreclosure suits for the amount of the decree, and is not able to sell the same; and therefore said fees are not yet due from the defendant.

The replication denies that it was "understood or agreed" that the plaintiff should furnish the general service he did for nothing, or on account of the fees received from borrowers; and admits the agreement stated in the answer as to the payment of the plaintiff's fees in foreclosure cases, but alleges that such agreement was made upon the express condition that the plaintiff was to have the foreclosure of all the defendant's mortgages, which conditions the defendant has failed to keep; and denies that the defendant has not been able to sell said mortgaged premises. On July 17, 1881, a change was made in the mode of compensating the plaintiff, by which the defendant agreed to pay him for the examination of titles at the rate of $1\frac{3}{4}$ per centum on the amount of all loans, including loans renewed, and to allow him to charge borrowers with expense of travel incurred in such examination, whereby his receipts were materially increased, and in consideration of which he expressly undertook to give the defendant verbal advice about its affairs, without further charge. But the defendant soon became dissatisfied with this method of compensation, and the result was that, as the plaintiff would not perform the service on terms less favorable to himself, the relation terminated about the end of the year.

The facts about the foreclosure fees appear to be as stated in the replication, except that the defendant has not been able to sell the property, and the referee so found, and that the defendant is therefore now liable to the plaintiff for the amount of them.

Concerning the claim for compensation for general services, the only question arising on the pleadings is their value, and whether there was any agreement that they should be rendered gratuitously, or in consideration of the fees received from borrowers. Prior to De-

ember, 1875, when the plaintiff was appointed attorney for the Oregon & Washington Trust Investment Company, he was in partnership for a short time with Mr. A. C. Gibbs, the then attorney of said corporation, and was familiar with the fact that his fees for abstracts, searches, investigation of titles, preparing and recording mortgages, not exceeding a certain percentage on each loan, were to be paid by the borrowers, and that there was no express provision for his compensation by the corporation for any service he might render it directly. When the plaintiff became the attorney of said corporation he was furnished with the following schedule concerning his duties and responsibilities:

"(A) To prepare all mortgages, deeds, notes, coupons, and other documents in connection with the company's loans, and to be responsible for their due execution, publication, registration, and validity; (B) to be responsible that all mortgages taken are a clear and indisputable first lien upon the subjects mortgaged, and to grant certificates to that effect; (C) to take charge of and to conduct such proceedings as may from time to time be instituted by the company, or in which the company may be interested, subject to such instructions as may be issued thereanent; (D) to advise the local board and directors of any point of legal or other interest to the company which may be developed or come under his or their notice from time to time by legislative or judicial action, or otherwise; (E) and generally to give his best attention to all the matters connected with the legal department of the company's business, and to give such information and advice as may from time to time be requested or occur to him."

—And was advised that his compensation for services in connection with taking security for loans should be paid by the borrowers, as in the case of his predecessor.

On March 3, 1875, a scale of fees to be paid the attorney by borrowers was fixed in the Dundee office, in which the percentage allowed the attorney on eight classes of loans, ranging from \$500 to \$4,000, was from $2\frac{1}{4}$ to $1\frac{1}{2}$ per centum on the amount loaned, but all loans over the latter sum paid a uniform rate of 1 per centum. This was the rule when the plaintiff was employed, but the local manager claimed and had been privately permitted to take, from this allowance, one-half of 1 per centum to aid in compensating him for his services to the corporation. To this division of his fees the plaintiff soon demurred, on the ground that what was left for him was not an adequate compensation for the labor, expense, and responsibility involved in the service to borrowers, and after some correspondence with the Dundee office it was arranged that the plaintiff should receive the whole amount of the fees paid by borrowers for services in and about the applications for loans. The official resolution on the subject was passed on November 23, 1876, and is in these words:

"Attorney. That Mr. Hughes, the company's attorney, be remunerated by fees charged to borrowers in terms of scale of March, 1875, and now current. The directors trust that these rates of remuneration which, along with the relative appointment, are to continue during their pleasure, will be satisfactory to all concerned."

The referee found (1) that there was no express contract between the plaintiff and these corporations concerning compensation for his direct and general service to them, but that, during the time of his employment by them, the directors and local manager "understood and supposed" that the plaintiff was rendering said services "in consideration of the fees" paid him by borrowers, and the fees that might be received in foreclosure cases; and "that such was their contract with the plaintiff, and their dealings and communications with the plaintiff were sufficient to notify him that they so understood it from the inception of the employment;" (2) that prior to the termination of the employment the plaintiff made no charge or claim for such services; (3) "that the compensation received by the plaintiff in fees from borrowers was no more than a reasonable compensation for the services rendered in direct connection" with the application for loans; and (4) that the reasonable value of the general services rendered by the plaintiff to the defendant and amalgamated corporations, as provided in paragraphs 4 and 5 of the rules aforesaid, is the amount stated in the complaint.

The defense, that it was "agreed" between the parties that the plaintiff should perform the general service in consideration of the fees received from the borrowers for the particular service, is not sustained. The burden of proof in this respect is on the defendant, and it has utterly failed to prove any such agreement.

But it is also alleged in the answer that it was "understood," and the referee has found that the defendant and the amalgamated companies "understood," during the time these general services were being rendered, that they were performed gratuitously, or in consideration of the fees paid by borrowers. But the understanding a party may happen to have about any matter does not constitute a contract between him and another to that effect. To amount to a contract—*aggregatio mentium*—the understanding must be "mutual." But even a "mutual understanding" is not, strictly speaking, a contract, but rather indicates a common knowledge or apprehension of a contract or transaction. However, the term is sometimes used in this sense, in a loose way, to signify a contract. In *Livingston v. Ackeston*, 5 Cow. 531, cited by counsel for the defendant, SUTHERLAND, J., speaking for the court, says:

"No doubt the services of the plaintiff, having been performed for the benefit of the defendant, with his knowledge and approbation, the law will imply a promise to pay for them, unless it appears that they [the plaintiff and defendant] understood that no compensation was to be made."

Nor is it material if the plaintiff, as found by the referee, had reason to believe that the defendant understood that by the contract the plaintiff was to perform these general services without charge, so long, at least, as he did not, by sufficient word or deed, cause or authorize such understanding or conclusion. The finding is therefore immaterial, and judgment might be given, notwithstanding it, for the value of the services as found by the referee.

Upon the findings, then, taken according to their legal effect, these general services were furnished these corporations at their request and for their benefit without any express agreement as to the mode or measure of compensation therefor, and such, in my judgment, is the decided weight of the evidence. In such a case, the law, in the interest of justice and right, implies or supplies such a promise or agreement concerning the compensation as fair and honest men ought to have made. 3 Bl. 443; 1 Pars. Cont. 4; *Ogden v. Saunders*, 12 Wheat. 341.

Whenever one person does any work or service for another with his consent, and there is no agreement as to compensation, the law implies a contract, contemporaneous with the doing of the work or service, to pay what the same is reasonably worth; and the burden of proof is upon the party who, admitting the promise, denies the conclusion, or undertakes to avoid or prevent this implication by showing that the work or service was performed gratuitously, or included in the compensation made for some other service or thing; as, for instance, that the party for whom the work or service is done declared at the time he would not pay for it. For the law will not imply a promise by a party, against his express declaration to the contrary, unless, as may happen, he is under a legal obligation to that effect, paramount to his own will. And such, and no more, is the doctrine of *Whiting v. Sullivan*, 7 Mass. 107, cited by counsel for defendant, in which it was held that the law would not imply a promise by the defendant to pay for the keeping of a horse, in the face of his express declaration to the plaintiff, at the time the horse was delivered to him, that he would not. The case of *Central Bridge Corp. v. Abbott*, 4 Cush. 473, is a good illustration of the exception to this rule, where the legal obligation of the party is paramount to his will. The defendant crossed the plaintiff's bridge, claiming that he was exempt from the payment of toll, and declaring that he would not pay any. But the court, having found that he was not exempt, held the law implied a promise on his part to pay the legal tolls, notwithstanding his declared intention to the contrary. The case of *St. Jude's Church v. Van Denberg*, 31 Mich. 287, also cited by counsel for defendant, stands upon another well-known exception to the rule. There a vestryman of the plaintiff in error, and an active member of the society, voluntarily acted as sexton for a time, and the court held that the law did not imply a contract to pay, because the circumstances clearly repelled the idea that the services were rendered or received with the expectation that payment therefor was to be made or claimed.

The contract which the law implies in any case "is co-ordinate and commensurate with duty," and never goes beyond the obligation supposed to be understood and acknowledged by all. 1 Pars. Cont. 4. Ordinarily, the law does not imply a contract to pay for services rendered by one member of a family to another, even by an adult child.

to the parent with whom he lives, or by the officers of charitable or religious societies to the society, because it is not commonly understood or acknowledged that such services, in the absence of express contract to that effect, are either rendered or received with the expectation of payment therefor being either made or claimed. An implied contract grows out of the acts of the parties, and never includes any stipulation or provision but such as ought, under the circumstances, to have been made. *Ogden v. Saunders, supra.*

In this case the contract between the parties is contained in the document defining the plaintiff's duties, and delivered to him on his appointment. This instrument was prepared by the corporation, and whatever of omission or uncertainty there is about it must be taken most strongly against the defendant. If it was intended or expected that the general service to the corporation should be compensated for by the fees received from borrowers, it was a simple and natural thing to have said so, unless it was apprehended that such an arrangement would make the loans usurious and void. And if it was thought lawful and desirable to exact from the plaintiff the gratuitous performance of these services as a condition or in consideration of giving him the opportunity to earn the fees from borrowers, why was it not mentioned? The instrument is evidently prepared with skill and care, and while it expressly and minutely provides for the attorney's "fees against borrowers," it is silent as to the compensation for the wide field of general service required to be performed by him for the corporation.

But significance is sought to be given to the word "remunerated," in the resolution of November 23, 1876, in this connection, and it is seriously contended that this resolution proves that the contract was that the "fees charged to borrowers" were to remunerate the plaintiff for his services to the corporation, as well as the borrowers. Abstracted from its surroundings, and read without reference to the circumstances that led to its adoption, it may be admitted that this resolution is susceptible of this construction; but when it is considered that it would make the loans of the corporation liable to be pronounced usurious, it ought not to be adopted unless for peremptory reasons. But when it is also remembered that this resolution is simply the result of a negotiation or correspondence between the plaintiff and the corporation, in which the former reasonably and justly claimed that he ought not to be required to divide his fees from borrowers with the local manager of the latter, but that he ought to be allowed to retain the whole of them, according to the terms of his appointment, and for the further reason that they were not a lucrative compensation for the services at best, there is no ground whatever for such construction.

Let us next consider what, if anything, there is in the circumstances of the case and the conduct of the parties to the contract to repel the conclusion, and prevent the implication that the general service was

performed and received with the expectation that it would be paid for according to its value, in addition to the fees received from borrowers. If the fees received from borrowers were very lucrative, and much beyond the real value of the services rendered to them, this would be a fact, more or less material, according to the circumstances, tending to show that they were really intended and understood by the parties as a compensation for general services as well. And however immoral or unjust such a transaction might be considered, as against the borrowers, probably the plaintiff ought not to be heard to impugn it. If these general services were also of a trivial or mere routine character, and comparatively of infrequent occurrence, this would enhance the probability that they were covered by the fees allowed to be taken from the borrowers. But the exact contrary is the fact, so far, at least, as the fees to borrowers are concerned. During the first year the Oregon & Washington Trust Investment Company, according to the testimony of the local manager, loaned about \$300,000, and one year its loans reached about \$500,000. The defendant's loans did not exceed \$100,000, but it was also doing a savings bank business, and purchased state and county warrants. First and last these corporations have loaned in Oregon and Washington about four millions, and had out therein, at one time, as much as \$1,700,000. During this period they declared annual dividends of from 6 to 10 per centum on their capital stock, and made from 10 to 21 per centum of profits thereon. The plaintiff's compensation for preparing or procuring abstracts, examining titles, making notes and mortgages, and procuring them to be recorded, in connection with these loans, varying in amount from \$500 upwards, was less than an average of $1\frac{1}{2}$ per centum on the amount loaned. And, in addition to the ordinary responsibility of an attorney, he absolutely guaranteed that in each case the title was good and the corporation got a first lien. During this period of nearly six years his gross income from this source did not reach \$30,000, and the expenses of the business were quite half of that. The plaintiff has exhibited a detailed statement of the loans made and the fees received by him during the last year of his employment, which he says was the best one. The amount loaned is \$607,200, divided among 326 loans, and his percentage is \$6,925.55, or 1.14 per centum of that amount. There is nothing in these facts calculated in the least degree to repel the implication that the corporation promises to pay the plaintiff specifically for his general services to them whatever they were worth. The compensation received from the borrowers, so far from being lucrative, was very moderate. I am quite certain that the ordinary charge for this service by a reputable attorney, without even the special guaranty, would have been not less than 2 per centum.

But it must be admitted that the conduct of the parties concerning the compensation of these general services is not distinguished for openness or candor. For nearly six years the corporations demanded

and received these services, and the plaintiff furnished them, without a word or intimation on either side that they were or were not to be paid for. And the plaintiff now frankly admits that while he always intended to claim a specific compensation for these services, he did not do so while the employment lasted, for fear he would have trouble with the corporations, about the amount of it, at least, and probably lose their business; and that in the absence of express provision in the contract concerning such compensation, he had a right to rely upon the promise to pay which the law would imply, and to claim the benefit of it whenever it best suited his interest or convenience, and within such time as the law would permit. But his conduct in this particular is more than balanced by that of the corporations. From time to time they requested and received these services from the plaintiff, well knowing that they had made no express provision concerning his compensation therefor, and never intimated to him that they did not intend to pay for them, or that they should claim that he ought to furnish them gratuitously, in consideration of the fees he was allowed to take from borrowers. There is nothing, then, in the circumstances of the case, or the conduct of the parties while acting under the contract, that will repel or prevent the convenient and just implication by the law of a promise by the corporations to pay the reasonable value of these services. They were furnished at their request, and received without any indication that they did not intend to pay for them. The fees received from the borrowers were but a moderate compensation for the services rendered them, and it is not reasonable to suppose that they were taken and received by the plaintiff in satisfaction of the services rendered the corporations also.

The referee has found that these services are reasonably worth the sum stated in the complaint. But I cannot agree with this conclusion for several reasons. The plaintiff kept no account of these services, and is therefore unable to give a detailed statement of them. The burden of proof is on him to show in what the services consisted, and their value. They may have been worth \$2,500 a year, but the court cannot assume that they were without the direct proof of one specific item. The failure to keep an account of these services is the fault of the plaintiff, and he must suffer for it, if any one. From the evidence it may be inferred that the plaintiff was freely plied with verbal and perhaps trivial questions by the local manager; but he does not appear to have draughted any agreements or furnished any written opinion. It also appears that at some time he was consulted about some scheme to escape local taxation; that he went before the county court to get the defendant's assessment changed or reduced; and that he attended the biennial sessions of the legislature when the corporations were threatened with hostile legislation. But no specific service of even this kind is mentioned or shown. Under the circumstances, the only measure of compensation which I think can be safely adopted, is to allow the plaintiff an annual sum as a re-

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tainer. And, in so doing, I must consider these three corporations as constituting one continuous client from January 1, 1876, to July 17, 1881, which, for convenience, may be considered five years and seven and a half months. And in fact this is the way the plaintiff treated them, and he so testified. This retainer, in my judgment, should not exceed \$1,200 a year, or \$6,750 for the whole period. Add to this the two foreclosure fees of \$756.80, and we have the sum of \$7,506.80, which the plaintiff is entitled to recover, with legal interest—\$900.81—from the commencement of the action, or the period of one year and six months, making in all the sum of \$8,407.61.

The findings of the referee are set aside, and findings by the court in accordance with this opinion will be filed in their stead.

HAZARD and others v. GRISWOLD.

(Circuit Court, D. Rhode Island. August 4, 1884.)

1. PLEADING—FRAUD.

A mere allegation of fraud in general terms, without stating the facts upon which the charge rests, is insufficient.

2. BOND TO PERFORM DECREE—BREACH—NEGLECT TO READ BEFORE SIGNING.

A person capable of reading and understanding an instrument which he signs, is bound in law to know the contents thereof, unless prevented by some fraudulent device, such as the substitution of one instrument for another.

3. SAME—PLEA TO JURISDICTION.

In an action for breach of a bond given in a suit in equity brought by a stockholder in behalf of himself and other stockholders, the obligors cannot defeat the action by pleading that the court had no jurisdiction of the suit in equity because the bill failed to allege that the corporation had been requested and had refused to bring the suit, the record made part of the plea showing that the defendant was personally served and appeared in such suit.

4. BOND—DURESS—SURETY.

Duress at common law, when no statute is violated, is a personal defense that can only be set up by the person subjected to the duress, and duress to the principal upon a bond will not avoid the obligation of the surety; at least, unless the surety, at the time of executing the obligation, is ignorant of the circumstances which made it voidable by the principal.

5. SAME—RELEASE BEFORE BREACH.

A release by the receiver of a corporation, appointed in Pennsylvania, is not a good ground for defense in an action brought for a breach, which consisted in the non-performance of a decree afterwards passed by the supreme court of Rhode Island.

Action of Debt on Bond.

Edwin Metcalf, for plaintiffs.

Saml. R. Honey and Arnold Greene, for defendant.

Before GRAY and COLT, JJ.

GRAY, Justice. This is an action of debt, commenced in the supreme court of the state of Rhode Island, on March 3, 1883, by four citizens of Rhode Island against a citizen of New York, on a bond dated

August 24, 1868, and executed by Thomas C. Durant as principal, and the defendant and S. Dexter Bradford as sureties, binding them jointly and severally to the plaintiffs in the sum of \$53,735, the condition of which is that Durant "shall on his part abide and perform the orders and decrees of the supreme court of the state of Rhode Island in the suit in equity of Isaac P. Hazard and others against Thomas C. Durant and others, now pending in said court within and for the county of Newport."

The breach assigned in the declaration is that Durant has not performed a decree by which that court, on December 2, 1882, ordered him to pay into its registry the sum of \$16,071,659.97.

After oyer prayed and granted, the defendant filed 10 pleas in bar, and the case was removed on his petition into this court, where the plaintiffs have filed special demurrers to five of the pleas, which have now been argued and will be considered in their order.

The second plea alleges that the supposed writing obligatory "was obtained from the said defendant by the said plaintiffs, and others in collusion with them, by fraud, covin, and misrepresentation, and that the said writing was executed in confidence of such misrepresentations." The demurrer to this plea assigns for cause that the defendant therein "nowhere sets forth any instance of or facts constituting fraud or covin, nor does he set forth the misrepresentations by which said writing obligatory is alleged to have been obtained." This plea is drawn in accordance with the rules and forms given in 1 Chit. Pl. (7th Eng. and 16th Amer. Ed.) 564, 608, and 2 Chit. Pl. 393. But the only authorities which Mr. Chitty cites are the early precedents of *Wimbish v. Tailbois*, 1 Plow. 38a, 54a, and *Tresham's Case*, 9 9 Rep. 107b, 110a, in which it is said "covin is so secret, whereof by intendment another man cannot have knowledge;" and the *obiter dictum* of Lord ELLENBOROUGH in *Hill v. Montagu*, 2 Maule & S. 377, 378, that "fraud and covin usually consist of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth." Both these reasons find a conclusive answer in the clear and emphatic statement of Mr. Justice BULLER, that by every rule of pleading "wherever one person charges another with fraud, he must know the particular instances on which his charge is founded, and therefore ought to disclose them. The rule in pleading is this: that wherever a subject comprehends multiplicity of matters, to avoid perplexity, generality of pleading is allowed, as a bond to return *all* writs, etc. But if there be anything specific in the subject, though consisting of a number of acts, they must be all enumerated." *J'Anson v. Stuart*, 1 Term R. 748, 753. And by the weight of modern authority, English and American, it is well settled that at law, as in equity, a mere allegation of fraud in general terms, without stating the facts on which the charge rests, is insufficient. Lord Chancellor SELBOURNE, Lord HATHERLEY, and Lord BLACKBURN, in *Wallingford v. Mutual Soc.* 5 App. Cas. 685, 697, 701,

709; *Service v. Heermance*, 2 Johns. 96; *Brereton v. Hull*, 1 Denio, 75; *Weld v. Locke*, 18 N. H. 141; *Bell v. Lamprey*, 52 N. H. 41; *Philips v. Potter*, 7 R. I. 289, 300; *Sterling v. Mercantile Ins. Co.* 32 Pa. St. 75; *Giles v. Williams*, 3 Ala. 316; *Hynson v. Dunn*, 5 Ark. 395; *Hale v. West Virginia Co.* 11 W. Va. 229; *Capuro v. Builders' Ins. Co.* 39 Cal. 123; *Cole v. Joliet Opera House*, 79 Ill. 96.

The third plea (relying upon the distinction affirmed in *Griswold, Pet'r*, 13 R. I. 125, to exist between a bond to "abide and perform" and a bond to "abide" a decree) alleges that the "said writing was obtained from the said defendant by the plaintiffs, and by others in collusion with them, by fraud, covin, and misrepresentation; that is to say, that heretofore the said Thomas C. Durant was arrested on a writ of *ne exeat*, issued from the supreme court of the state of Rhode Island, in a suit in equity, wherein one Isaac P. Hazard was complainant, and the said Durant and others respondents, which suit is the suit in equity mentioned in the condition to said supposed writing obligatory; and that the plaintiffs, with other persons colluding with them and assisting them as their agents and attorneys, procured the signature of the defendant to said supposed writing obligatory, representing to him that said writing was a bail-bond, and a bond conditioned that said Durant should abide the orders and decrees of the said supreme court in said cause; and that the defendant signed and sealed said writing, relying upon and believing such representations made by the plaintiffs, and such other persons colluding with them and assisting them as their agents and attorneys, all which representations were untrue and false, and by means of said misrepresentations the defendant, in confidence thereof, signed and sealed said writing." For causes of demurrer to this plea, the plaintiffs have assigned that the defendant does not allege therein that he is an illiterate or a blind person, and that upon his request to have the writing read to him it was falsely read, nor that he had not himself read it, nor that he was ignorant of its contents; nor that his signature to it was obtained by the fraudulent substitution of it for another instrument, which it was his intention to execute as surety, nor any other facts showing that he did not in fact know and was not bound in law to know its legal tenor and effect, or which would entitle him to rely upon the alleged representations of the plaintiffs and their agents and attorneys. This plea is clearly insufficient, for the reasons assigned in the demurrer. A person, capable of reading and understanding an instrument which he signs, is bound in law to know the contents thereof, unless prevented by some fraudulent device, such as the fraudulent substitution of one instrument for another. This plea does not aver any fact to excuse or justify the defendant in relying upon the representations alleged to have been made in behalf of the plaintiffs. *Thoroughgood's Case*, 2 Rep. 9; *Anon. Skin.* 159; *Maine Ins. Co. v. Hodgkins*, 66 Me. 109; *Seeright v. Fletcher*, 6 Blackf. 380; *Hawkins v. Hawkins*, 50 Cal. 558.

The fourth plea, of which a copy of the bill and record in the suit in equity in the supreme court of Rhode Island, mentioned in the bond sued on, is made part, alleges that it appears from an inspection of that bill and record that that court had no jurisdiction of the bill, or of the matter therein set forth, and that there was nothing alleged in the bill upon which that court could make any valid order or decree whatever, except to dismiss the bill, and that no decree had been made in the suit which the defendant could be lawfully called upon to abide and perform. This plea is demurred to, on the ground that it nowhere alleges that that court had not jurisdiction of that suit by reason of Durant's appearing therein as defendant or submitting himself to the jurisdiction of the court, or that that court had not jurisdiction of the suit and of Durant, or that its orders and decrees therein were not valid and binding upon him. The record of that suit shows that personal service was made on Durant within the jurisdiction of the court, and that he appeared in the suit. The bond, so far as this plea shows, was voluntarily given by Durant, and by the defendant as his surety. The only ground, appearing on the record or suggested in argument, for impugning the jurisdiction of the court, is that the bill, which was filed by Hazard, in behalf of himself and other stockholders in the Credit Mobilier of America, to charge Durant with certain funds of that corporation, did not contain sufficient allegations that the corporation had been requested and had refused to bring suit against Durant, to support a bill in behalf of the stockholders, within the rule established by the supreme court of the United States in *Hawes v. Oakland*, 104 U. S. 450. But the supreme court of Rhode Island is a court of general equity jurisdiction, and as such entertained that suit. Pub. St. R. I. c. 192, § 8; *Hazard v. Durant*, 11 R. I. 195, and 14 R. I. —. The defect suggested is not want of jurisdiction over the whole subject, but incompleteness in the statement of the facts required to justify the stockholders in invoking the exercise of that jurisdiction. Such a defect or informality cannot be availed of by either of the obligors to defeat an action upon the bond; and whether want of jurisdiction of the former suit on any ground could be set up in defense of this action need not be considered. *Jesup v. Hill*, 7 Paige, 95; *Griswold, Pet'r, ubi supra*.

The fifth plea alleges that Durant, at the time and place of the making of the supposed writing obligatory, "was unlawfully imprisoned by the said plaintiffs and others in collusion with them, and then and there detained in prison, until, by the force and duress of imprisonment of him, the said Thomas C. Durant, he, with the said defendant as surety, made the said writing, signed and sealed and delivered the same to the said plaintiffs as their deed." To this plea the plaintiffs have demurred, because it does not allege that the writing was executed by the defendant under force and duress of imprisonment of himself, nor that he did not voluntarily execute it as surety with knowledge that it was executed by Durant as principal

under force and duress of imprisonment, as alleged in the plea. This plea does not set forth facts enough to make out a defense. Duress at common law, where no statute is violated, is a personal defense, which can only be set up by the person subjected to the duress; and duress to the principal will not avoid the obligation of a surety; at least, unless the surety, at the time of executing the obligation, is ignorant of the circumstances which render it voidable by the principal. *Thompson v. Lockwood*, 15 Johns. 256; *Fisher v. Shattuck*, 17 Pick. 252; *Robinson v. Gould*, 11 Cush. 55; *Bowman v. Hiller*, 130 Mass. 153; *Harris v. Carmody*, 131 Mass. 51; *Griffith v. Sitgreaves*, 90 Pa. St. 161. The case of *Hawes v. Marchant*, 1 Curtis, 136, in this court, was not a case of duress at common law, but of oppression by the illegal exercise of official power in excess of statute authority, and was decided upon that ground.

The seventh plea, setting up a release executed to Durant in 1881 by a receiver of the corporation appointed in Pennsylvania, is clearly bad, because that release was executed a year before the decree of the supreme court of Rhode Island, the non-performance of which is the breach alleged in the declaration. The release, if it had any legal effect, could only be availed of by pleading it in that court before the decree. *Biddle v. Wilkins*, 1 Pet. 686.

Demurrers sustained.

In re AH QUAN.

(Circuit Court, D. California. August 7, 1884.)

1. CHINESE RESTRICTION ACTS — CERTIFICATE OF COLLECTOR OF PORT — EVIDENCE.

With reference to Chinese laborers re-entering the United States after having once left, congress did not intend, in the amendatory act of July 5, 1884, that the certificate of the collector of the port, required by section 4 of the original statute, should be produced by such Chinamen as had departed from the United States before it would have been possible to obtain the certificate from the collector. The presentation of such a certificate gives the Chinese a *prima facie* privilege to return, but the privilege may rest upon evidence other than the certificate, bearing upon the facts it would have proved.

2. SAME — CHINESE, OTHER THAN LABORERS, EN ROUTE TO UNITED STATES ON JULY 5, 1884.

Chinese, other than Chinese laborers entitled under the treaty with China, and not prohibited from entering the United States by the restriction acts, who left China or other foreign country before July 5, 1884, on their way to enter the United States, are now entitled to enter, upon such satisfactory evidence as was recognized as competent and sufficient before the amendatory act of July 4, 1884.

3. SAME — CERTIFICATE — GOOD ONLY TO ADMIT INDIVIDUAL DESCRIBED IN IT.

The certificate required of returning Chinese cannot entitle the wife or children of the holder to enter with him. There must be either an independent certificate for each, or else the certificate issued to the husband or father must contain also a certificate of the facts required, both as to the wife and each minor child sought to be introduced.

On *Habeas Corpus*.

S. G. Hilborn, U. S. Atty., for the United States.

T. D. Riordon, E. D. Wheeler, Harvey Brown, and L. J. Mowry,
for petitioner.

Before SAWYER and HOFFMAN, JJ.

SAWYER, J. Upon careful consideration of the act approved July 5, 1884, to amend an act entitled "An act to execute certain treaty stipulations relating to Chinese," etc., we hold and we have determined, in passing upon the right of Chinese to enter the United States, to be governed by the rules as stated in the following propositions:

1. Chinese laborers who were in the United States on the seventeenth day of November, 1880, and who departed from the United States prior to June 6, 1882, before the collector of the port was prepared to give the certificate required by section 4 of the original act, are entitled to re-enter the United States on satisfactory evidence, other than the certificate prescribed in said section 4, that they resided in the United States on November 17, 1880, or came into the United States between that date and August 4, 1882. There is nothing in the amendatory act on this point that requires a construction more unfavorable to Chinese laborers than that given by us in *Leong Yick Dew*, 19 FED. REP. 490, to the original act. Dropping the word "and," after the clause in section 3 in the original act, "the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880," etc., and substituting therefor in the amendatory act, "*nor shall said sections apply to Chinese laborers who shall produce to said master, etc.,*" * * * the evidence hereinafter in this act required of his being one of the laborers in this section mentioned," makes two classes—the general class, embracing all who were in the United States between the two dates, and the sub-class, being those of that class who could obtain the certificate provided for in the next following section 4. This change renders the propriety of our construction of the original act still more apparent, and seems intended to affirm it. Section 4 only applies, and in the nature of things *can only apply*, to those Chinese laborers in the country at the dates mentioned, who departed from the country after the passage of the act; for as to those who had already departed it was impossible for the collector to go on board of the vessel *before their departure* and make the prescribed list, or deliver the prescribed certificate. The last clause of section 4, making the prescribed certificate "the only evidence permissible to establish a right of re-entry," has reference alone to those Chinese laborers provided for in the first part of the same section, and in the nature of things could only refer to that class, for as to no other could the collector possibly go aboard the vessel before her departure and make the list and issue the certificate. The act certainly did not contemplate that the collector should perform these acts upon vessels and in regard to Chinese laborers already gone. The lan-

guage is, "the *said* certificate shall be the only evidence," etc. What is the "*said* certificate?" Clearly, the certificate which the collector is to issue to the departing laborer, in pursuance of the provisions of the first clause of the section, *upon going aboard the vessel and making the required list before her departure*. It could be no other. No other certificate is provided for, and this could not be done, and congress did not do, or intend to do, so unreasonable a thing as to give a right to a certificate, and impose the correlative duty to produce it, as to persons who had already departed before the passage of the act, and could not obtain it. The act imposes a duty and obligation on the government, through the collector, correlative and precedent to the obligation imposed on the Chinese laborer to produce the prescribed certificate, and the obligation of the latter to produce the certificate necessarily arises subsequently to, and is dependent upon, the performance of the correlative and precedent duty and obligation on the part of the government to furnish it. To hold that congress intended to require the performance of the dependent obligation on the part of the Chinese laborer until the government has discharged its correlative and precedent duty and obligation upon which his obligation rests, imposed by the act, by furnishing the certificate and thereby rendering it possible for him to produce it, would be to attribute to congress a deliberate intent to enact a palpable and glaring absurdity, thereby violating one of the most venerable canons of statutory construction, that a statute must not be so construed as to lead to an absurd conclusion. We must conclude, therefore, that it was not intended to require the production of the certificate by those who departed from the country before it was possible to obtain it. And that congress did not intend to exclude such Chinese laborers as were in the country at the time mentioned is clearly manifest, because it has said so in express terms in the provision of section 3, "that the two foregoing sections [excluding Chinese laborers] shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880," etc. It is clear, from the necessities of the case, that this section is only applicable to those who departed after the passage of the act, and who had the opportunity to procure the certificate. To hold otherwise would be to render this clause, making the impossible certificate the only evidence as to those who had departed before the passage of the act, absolutely inconsistent with the clause of section 3 referred to, that the preceding sections "shall not apply to Chinese laborers who were in the United States" at the designated period, and render that provision wholly nugatory, as well as to violate the treaty which the act professes to execute and not to abrogate. The different provisions of the statute must be so construed, if possible, that they can stand together, and not so as to nullify each other.

The clause of the amendment making the certificate the only evidence as to those to whom it is applicable of a right to re-enter the

United States, only declares in express and explicit terms what we held the original act to mean, and in no way changes its effect, in this particular, as we had construed it. Our construction of the original act in *Leong Yick Dew*, 19 FED. REP. 491, was before congress at the time of the passage of the amendatory act. If it had been intended to make the amendment as to the prescribed certificate being the only evidence of a right to return applicable to those Chinese laborers who were in the country at the date of the treaty, and who departed after that date and before it was possible to obtain the certificate required, as to whom *we had before distinctly held it to be inapplicable*, congress would certainly have amended the first clause of section 3 so as to read, in substance, as follows:

"The two preceding sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880," etc., "*except as to those who departed from the United States after said seventeenth day of November, 1880, and before the passage of the act, or before it was possible to obtain such certificate.*"

This is, in effect, the way those who insist upon the production of such certificate by that class, as the only evidence of their right to re-enter the United States, must read it in order to sustain their view. Congress has not introduced any such exception, and we are not authorized to interpolate it into the act. To do so would be to legislate, not to construe. The action of congress in not introducing any exception of the kind indicated, in view of our well-known previous construction of the original act on this very point, is, in effect, an emphatic approval of that construction.

The requirements of the certificate have, it is true, been enlarged, but this in no way affects the act in this respect as construed by us upon any disputed point of construction. We are entirely satisfied with the decision in the case cited, and adhere to it, and apply it to the amended act, to which it is as clearly applicable as to the original, and, we think, more clearly so.

The United States attorney insists that it ought now to be conclusively presumed that all Chinese laborers who departed between the dates named have already returned. Congress has not provided that there shall be any such presumption, conclusive or otherwise, and we are not authorized to legislate or incorporate any such presumption into the act.

2. The only evidence upon which Chinese laborers who departed from the United States after June 6, 1882, can now be admitted, is a certificate containing all the essential matters required by section 4 of the original act, or the certificate provided for in the amendatory act; and Chinese laborers who departed from the United States prior to July 5, 1884, or before the collector was prepared to issue certificates under the latter act, having such a certificate regularly issued under the act of 1882, and who produce it to the collector on their

return, are *prima facie* entitled to re-enter the United States, although they do not arrive till after July 5, 1884.

3. Chinese laborers who have departed from the United States since the collector has been prepared and ready to furnish the certificates required by section 4 of the restriction act, as amended by the said act of July 5, 1884, can only re-enter the United States upon the production of the certificate required by said amendment, which is the only evidence to show a *prima facie* right, in such cases, to re-enter the United States. Should the United States produce evidence to overthrow such *prima facie* evidence of a right to re-enter the United States, the party claiming the right to re-enter may rebut such evidence produced by the United States, by any evidence generally competent under the ordinary rules of evidence.

4. Chinese other than Chinese laborers, entitled, under the treaty with China, and not prohibited from entering the United States by the said restriction acts, who left China or other foreign country before July 5, 1884, on their way to enter the United States, are now entitled to enter upon such satisfactory evidence as was recognized as competent and sufficient before the passage of said amendatory act of July 5, 1884.

5. The wife or minor child of a man of the Chinese race entitled to come to the United States, other than a Chinese laborer, is a "Chinese person," within the meaning of said original and amendatory restriction acts, and entitled to enter upon the production of the required certificate, but not otherwise, under the provisions of the said amendatory act. They cannot, nor can either of them, enter upon the certificate issued to the husband or father alone, not embracing the required description and name of the wife or child. There must be either an independent certificate, such as required, or the certificate issued to the husband or father must also contain a certificate of the facts required by the statute, both as to the wife and as to each minor child sought to be introduced. But the wife and minor children, who have not, in fact, adopted the occupation of a laborer, of a Chinese man, should be deemed to belong to the class to which the husband or father belongs.

I will say in regard to the last proposition that the amendatory act says: "Every Chinese person other than a laborer * * *" shall procure the prescribed certificate. It does not say every Chinese person except the wife or child of one having a certificate; and we are satisfied that the provision embraces every Chinese individual. Webster defines a "person" to be an individual of the human race, and includes men, women, and children. Bouvier's Law Dictionary also defines the word "person" as including men, women, and children. "Every Chinese person" is a term of broad significance, and manifestly includes all, as used in this act of congress. We are unable to give it any other construction. We are not authorized to

introduce a provision like this: every Chinese person "except the wife and child of a Chinese man presenting the required certificate." That would, also, be legislating, rather than construing. We do not perceive that it would make any great difference, when the construction becomes known, and it is the natural construction which any one would put on the act. The husband, when he obtains a certificate for himself, can as readily obtain it for his wife and child,—either an independent certificate, or have the name and facts showing the relations of the parties introduced into his own certificate concerning them all. Any other construction would open the door to extensive frauds that might be perpetrated, because there can be no distinction between an infant from the time he is born until he is 21 years of age. He, in law, is a minor—an infant—until his majority, under the control of his father and a part of his father's family. There are a great many coming here from 12 to 21 years of age, and any one who might choose to father these minor children might bring any number of them hither if the construction claimed for it is allowed. It would open the door to frauds and difficulties, whereas, now, on the construction adopted, the requirements of the act are very clear, and can be readily complied with by the party applying for a certificate for himself, by, at the same time, procuring one for his wife and child, or having the proper facts incorporated into his own certificate. These are the propositions which we adopt in the construction of the new act, and which we propose to apply in passing upon the questions arising in the cases that are now before us.

UNITED STATES v. WEBSTER.¹

(*District Court, D. Indiana. May Term, 1884.*)

1. **INDICTMENT—SOLDIERS' DISCHARGE PAPERS—WITHHOLDING OF.**

The act of May 21, 1872, (17 St. at Large, 13,) "prohibiting the retention of soldiers' discharges by claim agents and attorneys," is still in force as to the retention of soldiers' discharges; and while not carried into the Revised Statutes, neither is any portion of it embraced in any section of the Revision, within the meaning of the "repeal provisions," (Rev. St. §§ 5595, 5596,) and it is not therefore affected nor changed by the Revision.

2. **SAME—REV. ST. § 5485—LAND-WARRANTS.**

Section 5485, Rev. St., is taken textually from section 31, act of March 3, 1873, (17 St. at Large, 585,) which act impliedly repealed that part of the act of 1872, *supra*, relating to the withholding of land-warrants; but section 5485, Rev. St., *per se*, does not in any way concern nor affect the act of 1872 in respect to discharge papers.

On Motion for Instruction to Jury.

Baker, Hord & Hendricks, for defendant.

¹Reported by Chas. H. McCarer, Esq., Asst. U. S. Dist. Atty.

Chas. L. Holstein, U. S. Atty., and *Chas. H. McCarer*, Asst. U. S. Atty., for the United States.

Woods, J. The first count of the indictment is predicated upon the act of congress approved May 21, 1872, and charges the defendant with having unlawfully withheld a discharge paper from its owner. Counsel for the defendant ask an instruction to the jury to the effect that this law was repealed by the enactment of the Revised Statutes of the United States, section 5485, of which, it is claimed by counsel, embraces a portion of the act in question, namely, the portion which makes it a misdemeanor to withhold a land-warrant from the owner without his consent. In the judgment of the court the instruction must be denied. The "repeal provisions" of the Revised Statutes (title 74, §§ 5595, 5596) are to the effect that the Revision shall be deemed to "embrace the Statutes of the United States, general and permanent in their nature, in force on the first day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of congress," and that "all acts of congress passed prior to said first day of December, * * * any portion of which is embraced in any section of said Revision, are hereby repealed: provided, that * * * all acts of congress passed prior to said last-named day, no part of which are [is] embraced in said Revision, shall not be affected or changed by its enactment."

While the act of 1872, in the terms of its enactment, embraces *land-warrant* as well as *discharge papers*, it had been repealed in respect to land-warrants before the enactment of the Revision, and consequently it cannot be said with propriety that the provisions of section 5485 of the Revision, in respect to the withholding of land-warrants, was taken from the act in question. On the contrary, it is plain that section 5485 was taken textually from section 31 of the act of congress, approved March 3, 1873, entitled "An act to revise, consolidate, and amend the laws relating to pensions." 17 St. 585. This section (31) declares it to be a high misdemeanor to withhold wrongfully from the owner the land-warrant issued to him, and provides for different and severer punishments than are required for the like offense by the act of 1872, and consequently, by implication, repeals that act in respect to land-warrants; but as a repeal by implication, in such a case, goes no further than the inconsistency between the later and the earlier statute, it must be held that in respect to discharge papers the law of 1872 is still in force.

ESTES and others v. WILLIAMS and others.

(Circuit Court, S. D. New York. July 31, 1884.)

TRADE-MARK—FOREIGN PUBLISHER—AMERICAN ASSIGNEE—USE OF A NAME—RIGHT OF ACTION.

The publisher of "Chatterbox," in England, having assigned the exclusive right to use and protect that name in this country, the assignee may maintain his action against any other person who undertakes to publish books under that name in the United States.

In Equity.

J. L. S. Roberts, for orators.

Walter M. Rosebault and Roger Foster, for defendants.

WHEELER, J. Mr. James Johnston, of London, England, appears to have published a regular series of juvenile books of uniform appearance, and in a style of peculiar attractiveness, and called them the Chatterbox, until they have become widely known and quite popular by that name, in that country and this. He assigned the exclusive right to use and protect that name in this country to the orators for 10 years from January 1, 1880. The defendants have since that time commenced the publication of a series of books, and called them by that name, and made them so similar in appearance and style to those of Johnston as to lead purchasers to think they are the same. As a matter of fact it is found that they intended to make the books appear to be the same, and to avail themselves of the popularity which the books had attained by the labor and skill bestowed upon them by and at the expense of Johnston. There being no copyright to prevent, the defendants claim the right to so print and publish the series of books in this country, and that if they have not the right, the orators have no right to prevent them. There is no question but that the defendants have the right to reprint the compositions and illustrations contained in these books, including the titles of the several pieces and pictures. *Jollie v. Jaques*, 1 Blatchf. 618. That does not settle the question as to the right claimed here. There is work in these publications aside from the ideas and conceptions. Johnston was not the writer of the articles nor the designer of the pictures composing the books, but he brought them out in this form. The name indicates this work. The defendant, by putting this name to their work in bringing out the same style of book, indicate that their work is his. This renders his work less remunerative, and while continued is a continuing injury which it is the peculiar province of a court of equity to prevent. These principles are discussed, settled, and applied in *McLean v. Fleming*, 96 U. S. 245.

It has been argued that there have been various publications from earlier times by the same name, so that no new right to the use of that name could be acquired. This would be true, doubtless, as to all such publications as those to which the name was applied, but not as

to those essentially different. The fact of these other publications bears only upon the question of fact as to whether Johnston's work had come to be known by this name, and the defendants by using the name represent that their work is the same. The conclusion stated as to the fact has been reached after consideration of what is shown as to these other publications.

Johnston had the exclusive right to put his own work, as his own, upon the markets of the world. No one else had the right to represent that other work was his. Not the right to prevent the copying of his, and putting the work upon the markets, but the right to be free from untrue representations that this other work was his when put upon the markets. This gives him nothing but the fair enjoyment of the just reputation of his own work, which fully belongs to him. It deprives others of nothing that belongs to them.

The question then arises whether Johnston could transfer his right, or any part of it, to the orators, so that the defendants, in what they have done and are about to do, trespass upon the orator's rights, and not upon Johnston's. He could not do all this himself; he must act by and through others. No reason is apparent why he could not give them the exclusive right to put his work on the market as his, as he had that right. This seems to be what he undertook to do. They had that right, and the profits of its enjoyment would belong to them. The defendants would deprive them, and not Johnston, of the profits. The injury would be to them and not to him, and they are, in this view, entitled to the remedy.

It is objected that they also trespassed upon Johnston's rights before they acquired them. This may be true, and, if so, they may be liable for the damages. Such a trespass would not prevent them from acquiring a lawful right in a lawful manner. Had such trespasses been so frequent and long-continued that the work had come to be known to be the work of others, or had lost identification as the work of Johnston, the course of the defendants might not amount to any representations that their work was his; but the evidence does not show this. As the case is now understood the orators appear to be entitled to relief.

Let there be a decree for an injunction and an account.

THE SENATOR.

District Court, N. D. Ohio. November 4, 1876.

PROCEEDINGS IN REM—STEVEDORE SERVICE.

The services of a stevedore are necessary to the general business of the transportation of the cargo, and contribute to the rewards of capital employed in maritime service. They should be regarded as maritime service, and the stevedore furnished with a remedy against the vessel.

In Admiralty.

H. D. Goulder and F. Kelly, for libellant.

WELKER, J. The libellant made a contract with the master of the vessel to perform service as a stevedore, to unload her cargo at the port of Cleveland. Having performed the service, and not having received his pay therefor, he proceeds *in rem* against the vessel for his wages.

The only questions made in this case are, whether the service was a maritime one, and whether a lien therefor attached upon the vessel. Stevedores are a class of laborers at the ports, whose business it is to load and unload vessels; and by long practice they become experts at the business. Like the occupation of a sailor, it requires practice as well as judgment to insure the faithful and profitable discharge of the duty. The safety of the vessel, as well as the cargo, depends very largely upon the manner in which it is loaded,—how the cargo is stored; whether secured so that one part of it does not injure another, or that storms do not break it loose, or shift and thereby damage it; and whether the vessel is trim or well-balanced for navigation. The necessity for skilled labor has created the demand for this separate class of laborers, and induced men to adopt it as an occupation. They have, in the large expansion of the business of transportation upon our lakes and rivers, become a necessity in every port. The demand for such service cannot be fulfilled by the common laborer; hence they have become so connected with navigation, to load as well as unload vessels, that they are regarded as a part of the maritime machinery for the commerce of the lakes. They perform an indispensable part of the transportation and delivery of a cargo,—to begin it and conclude it. If services intermediate are regarded as maritime, why not the commencing and closing service? The libellant in this case having been employed by the master of the vessel to unload the cargo, and the contract being one within the scope of his authority as such master, it would seem that the service would come within the rule referred to by Judge EMMONS in *The Williams*, (1 Brown, 208,) in which he quotes and adopts the language of Judge WARE in *The Paragon*: "Every contract of the master within the scope of his authority binds the vessel, and gives the creditor a lien for his security." In the same case Judge Em-

mons also says: "All maritime contracts made within the scope of the master's authority do, *per se*, hypothecate the ship."

I am aware that there are decisions opposed to the right to proceed *in rem* for this class of service; but they do not seem to be founded on sound principle, and I do not feel it to be my duty to follow them. There does not seem to be any difference in principle between that service and the service performed by the sailor, the lighter-man, the man who sets the rigging, who scrapes the bottom or paints the side of the vessel, or by him who furnishes supplies, or tows the vessel out or into the port. They are all necessary to the general business of the transportation of the cargo, and contribute to the reward of capital employed in maritime service, and alike should be regarded as maritime service, and furnish a remedy against the vessel.

Decree for libellant.

See *The Bernard*, 2 FED. REP. 712; *The Windermere*, Id. 722, 727; *The Canada*, 7 FED. REP. 119; and *Hubbard v. Roach*, 2 FED. REP. 394.—[ED.]

HAZARD and others v. ROBINSON and others.

(Circuit Court, D. Rhode Island. August 4, 1884.)

1. FEDERAL COURT—STATE COURT—REMOVAL OF CASE—FORMAL COMPLAINANTS.

When a party complainant to a bill in chancery has been made so, not with a view to obtain any decree in his favor, but solely for the purpose of securing the rights of other individual complainants, his being a resident of a state other than that in which the defendant resides is no cause for removal.

2. FEDERAL COURT—STATE COURT—REMOVAL OF CASE—FROM WHAT DETERMINED.

The question whether there is a separate controversy warranting a removal to the United States circuit court must be determined by the state of the pleadings and record of the case at the time of filing the petition for removal, and not by the allegations of that petition.

Motion to Remand Cause.

Amasee M. Eaton and Josiah Porter, for complainants.

Edward H. Hazard, Chas. H. Parkhurst, Elisha C. Clarke, Benj. Case, and Francis C. Nye, for respondents.

Before GRAY and COLT, JJ.

GRAY, Justice. This is a motion by the complainants to remand to the supreme court of the state of Rhode Island a suit in equity removed into this court upon the petition of James A. Robinson, one of the defendants, under the act of congress of March 3, 1875, c. 137, § 2.

The question now before us is not whether the bill can be maintained, but whether the case should be tried in this court or the state court. The only difficulty in deciding this question arises from the clumsy and inartificial frame of the bill. So much of the bill as is material to the understanding and determination of this question is as follows: It begins by stating that it is brought by the widow and heirs at law of Jonathan N. Hazard, (some of whom are citizens of Rhode Island and the others citizens of New York, and one of whom, John C. Hazard, is described as suing "in his own right, or as trustee, or however otherwise,") and by the Narragansett Pier Company, (a corporation created in 1836 by a statute of Rhode Island,) against Attmore Robinson and Benjamin F. Robinson, citizens of Rhode Island, James A. Robinson, a citizen of New York, and others, whom it is unnecessary to enumerate. It alleges that Jonathan N. Hazard died intestate in 1878, leaving no debts, and therefore no letters of administration have been taken out on his estate; that his widow and heirs are the legal owners of the property, real and personal, forming his estate; that he owned an undivided half of the property belonging to the Narragansett Pier Company, and half of the shares in its capital stock; and that the defendant Attmore Robinson owned the other half of such property and stock. It alleges that the complainants are not informed whether any legal organization of the company was ever effected under its charter; that there have been

no meetings of the company since 1864; that by the charter such meetings can only be called by the president or by two directors; that there are not, and for a long time past have not been, any president or directors; that the charter and any organization under it are in abeyance, and consequently it is impossible to prevent the bar of the statute of limitations from giving title to the defendants, Benjamin F. Robinson and others, by adverse possession, except by making the Narragansett Pier Company a party complainant to this bill. The bill is signed by each of the heirs in person, and by the widow by attorney, and is countersigned by two members of the bar as "solicitors for complainants," but is not otherwise signed by or in behalf of the Narragansett Pier Company. The other principal allegations of the bill are that Jonathan N. Hazard, on May 10, 1848, made a mortgage of his shares to the defendant Attmore Robinson, to secure the payment of certain notes, which were afterwards paid in full; and further, that Attmore Robinson, wrongfully and without authority, assumed to act as agent of the company, took possession of and converted to his own use all its property, and made leases and conveyances thereof, and never accounted to the company or to its members for rents and profits, or for the proceeds of sales; that under such conveyances and sundry mesne conveyances (particularly set forth in the bill) lands of the company are severally claimed by the defendants; and that these conveyances, and especially those to the defendant James A. Robinson, were fraudulent and void. The bill prays for an account of rents and profits and other receipts of Attmore Robinson from the property of the company, and that the mortgage to him from Jonathan N. Hazard be discharged, and the other conveyances be declared void, and for further relief.

The petition for removal, which was filed seasonably and before answering the bill, was based upon the last clause of section 2 of the act of 1875, which provides that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States."

The jurisdiction of this court is sought to be upheld upon two grounds: *First*, that there is such a controversy between the petitioner, a citizen of New York, and the Narragansett Pier Company, a Rhode Island corporation; and, *second*, that there is such a controversy between the petitioner and John C. Hazard, a citizen of Rhode Island. Upon full consideration, we are of opinion that neither of the reasons assigned is sufficient to justify this court in retaining jurisdiction of the case.

The whole object of the bill is to establish the rights of the widow and heirs of Jonathan N. Hazard in his interest in the stock or property of the Narragansett Pier Company; and that company is made

a party to the bill, not with the view of obtaining any decree in its favor, but solely for the purpose of securing the rights of the individual complainants. The bill leaves it uncertain whether the company ever was organized or had any legal existence as a corporation, and is framed with the view of asserting rights, either in its stock, if a corporation, or in its property, if a voluntary association. So far as concerns the mortgage to Attmore Robinson, that was a mortgage of Hazard's shares only, in the discharge of which neither the corporation nor any holder of other shares had any interest. So far as concerns the conveyances of corporate property alleged to have been fraudulently made by Attmore Robinson, assuming to represent the corporation, the bill is framed upon the theory that, there being no president and directors to whom application could be made to call him to account, the individual complainants, as stockholders, are entitled to proceed against him and his grantees, and to use the name of the corporation in so doing. The corporation is no more than a formal complainant, and might, perhaps more properly, have been made a defendant. *Hawes v. Oakland*, 104 U. S. 450; *Hazard v. Durant*, 11 R. I. 195; *Mason v. Harris*, 11 Ch. Div. 97. There is, therefore, no controversy between the corporation and such a grantee which can be fully determined as between them without the presence and participation of the real complainants. *Myers v. Construction Co.* 100 U. S. 457; *Ayers v. Chicago*, 101 U. S. 184.

The petition for removal alleges that Jonathan N. Hazard, in 1864, assigned to the complainant John C. Hazard all his property for the benefit of his creditors; that it is insufficient to pay his debts, and therefore the widow and other heirs have no interest in this suit, and the controversy is between the petitioner and the assignee, a citizen of Rhode Island. But the facts thus alleged cannot be considered. The question whether there is a separate controversy, warranting a removal into the circuit court, must be determined by the state of the pleadings and record of the case at the time of filing the petition for removal, and not by the allegations of that petition.

It appearing to the satisfaction of this court that the suit does not really involve a dispute or controversy properly within its jurisdiction, it is its duty, under section 5 of the act of 1875, to order it to be remanded to the state court.

ZUNKEL v. LITCHFIELD.

(Circuit Court, S. D. Iowa. 1884.)

REFERENCE OF A QUESTION OF VALIDITY OF EVIDENCE TO A MASTER FOR REPORT.

In the event of interrogatories being propounded calling for testimony so clearly and manifestly foreign to the controversy that they ought to be rejected at the very threshold of the case, the court will not hesitate to make a reference to the master, with instructions to report whether any interrogatories, to which specific objections are made, call for answers manifestly irrelevant to the controversy.

In Equity.

This cause is now before the court upon objections to certain cross-interrogatories propounded to the defendant, Litchfield. The motion is "for an order of reference of the cross-interrogatories, and the objections thereto, to a master of the court, to examine them, and report upon the sufficiency and validity of the complainant's objections to the same."

C. H. Gatch, for the motion.

Phillips & Day, contra.

LOVE, J. There is no doubt that a court of equity may, in its discretion, entertain such a motion. There is just as little doubt that the court ought to exercise its discretion to refer in such a case with the greatest possible caution. It is manifest, on the one hand, that interrogatories may call for disclosures wholly immaterial to the controversy, and even scandalous and impertinent. A party may, under pretext of making proof material to his cause, greatly abuse the privilege of examining witnesses when not in the presence of the court, and I must say that this privilege is greatly abused in the practice of the bar. Under the semblance and protection of a legal examination a party may, when the court is not present, attempt to give vent to his malicious feelings toward his adversary or his witnesses. It is manifest that he may thus attempt to expose his adversary or his witnesses to public ignominy and disgrace without any legitimate purpose whatever. He may vex the party opposed to him by attempting to bring into the cause matters wholly foreign to the issue to be tried. It would be most unreasonable to contend that the court should in such extreme cases allow the examination to proceed, leaving the party to such remedy as he might have by motion to suppress, after the intended mischief is inflicted. There can be no serious difficulty where the interrogatories involve matter of mere scandal and impertinence wholly foreign to the controversy. It is well-settled practice to refer the pleadings to the master to purge them of scandal and impertinence. There is no doubt that interrogatories may be referred for the same reason. But where the alleged ground of reference is that the testimony sought to be elicited

by the interrogatories is wholly irrelevant to the issue, a serious difficulty arises. How can the court or master, without going into the whole case in advance of the hearing, determine whether the testimony sought is wholly irrelevant or not? A chancery case often presents difficult and complex questions and various issues. It frequently happens that one matter of evidence becomes necessary to rebut or explain some other matter of evidence coming incidentally into the inquiry. Counsel must necessarily, in filing interrogatories, anticipate testimony which his adversary's witnesses may give, and seek, by cross-interrogatories, to explain or rebut it. Hence the extreme—indeed, almost insuperable—difficulty of assuming to strike out interrogatories *in limine*. The safer course is to allow the interrogatory to be answered in any doubtful case, and determine the objections to it at the hearing, or in the progress of the cause, upon a motion to suppress. Nevertheless, it may occur that interrogatories may be propounded calling for testimony so clearly and manifestly foreign to the controversy that they ought to be rejected at the very threshold of the case. When such appears to be the case the court will not hesitate to make a reference to the master, with instructions to report whether any interrogatories to which specific objections are made call for answers manifestly irrelevant to the controversy. If any doubt exists as to the materiality of the testimony sought, the court will not interfere, but leave the party to his ordinary remedy by motion to suppress.

The defendant's motion is sustained, and the reference ordered, with the foregoing instructions. See *Cocker v. Franklin & Bagging Co.* 1 Story, Rep. 169.

IRONS v. MANUF'RS NAT. BANK.

(District Court, N. D. Illinois. July 14, 1884.)

1. NATIONAL BANKING LAW—LIABILITY OF STOCKHOLDER—PURPOSE OF THE LAW.

It was the intention of congress by its act (Rev. St. § 5151) to make the excess of the cost of the stock of a national bank, up to the par value, an asset of the bank, to be resorted to in the event of insolvency, or a guaranty fund, (so to speak,) in case the property of a bank is insufficient to pay its debts. Whoever becomes a stockholder assumes this liability as an element of his contract.

2. SAME—LIABILITY OF PERSONS HOLDING STOCK IN A REPRESENTATIVE CAPACITY.

Section 5152, Rev. St., was designed to protect persons who hold stock in a representative capacity from any personal liability, and only makes the funds in the hands or under the control of such representative liable.

In Equity.

Mason Bros., for plaintiff.

H. B. Hurd, for defendant.

BLODGETT, J. The principal facts which I deemed it necessary to consider for the disposition of the point now in question are these: William H. Adams was a shareholder in the Manufacturers' National Bank. In November, 1874, the bank suspended payment, closed its doors, and by a vote of the shareholders went into voluntary liquidation, being at that time largely indebted beyond its assets. Subsequently, James Irons, a judgment creditor, filed a creditor's bill, and obtained the appointment of a receiver to administer the assets of the bank. After the passage of the act of June, 30, 1876, in regard to winding up the affairs of national banks, a supplementary bill was filed, to which Adams was made a party for the purpose of enforcing the liability of the stockholders. Pending this proceeding against the shareholders Adams died, and a bill of revivor was filed against his administrator, and the latter demurs to the bill, on the ground that the liability of a shareholder of a national bank does not survive against his estate.

Section 5151 of the Revised Statutes provides that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

In support of his demurrer the administrator cites a large number of adjudged cases, chiefly from Massachusetts and Pennsylvania, where the contingent liability of shareholders for the debts of the corporation in which they held stock, under the special statutes of those states, was involved and considered; but it is noticeable that in most of the cases the question was either on the liability of the executor or administrator to pay calls or assessments on the stock of deceased stockholders, where it was clear that the stock would only be a burden to the estate; or in cases where the stockholder's liability was held to be in the nature of a penalty for some violation of the provisions of the statute regulating the affairs of the corporation. As I understand the able and exhaustive brief filed by the learned counsel for defendant, he concedes that if the liability of a shareholder of a national bank is to be construed as a contract obligation, then it survives as against the representatives of his estate.

So far as the clause of the national bank act which I have quoted has been construed by the court, it seems to me to have been assumed that it was the intention of congress to make this a contract liability. These cases are *Davis v. Weed*, 44 Conn. 569; *Hobbs v. Western Nat. Bank*, 9 Reporter, 469; *Davis v. Stevens*, 17 Blatchf. 259; *Laing v. Burley*, 101 Ill. 591. From all the various provisions of the act it seems to me that it was the intention of congress to make this liability to the extent of the par value of the stock, over and above what the stock had cost, an asset of the bank, to be resorted to in the event of insolvency, or a guaranty fund, so to

speak, in case the property of a bank was insufficient to pay its debts. Whoever became a shareholder assumed this liability as an element of his contract. He is declared individually responsible for the liabilities of the bank, to the extent of the amount of his stock at the par value thereof, and this responsibility attaches as soon as the relation of shareholder is assumed, and continues until the relation ceases. My view is that congress intended to give all persons dealing with the bank the guaranty or assurance of this shareholder's liability, for the purpose of giving credit to banks organized under this law. The capital paid in on the shares might be lost or wasted by fraud or bad management, but this additional shareholder's liability could not be wasted, but remains as a fund to be resorted to for the payment of debts when the other means of payment are exhausted; and it would certainly very much abridge this security if the liability of a shareholder is to cease with his death. It seems to me to be a liability which survives against the estate of a deceased shareholder, to the same extent as if the shareholder had, at the time he subscribed to or acquired his stock, signed a written agreement to pay an amount equal to the par value of the stock, on the debts or liabilities of the association, when called upon by the receiver of the bank to do so, and such an agreement undoubtedly would survive as against the representatives of the shareholder's estate.

Some stress is also laid in this case upon the succeeding section, which reads as follows:

"Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liability as stockholders; but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name."

I think the only purpose of this section is to protect persons who hold stock in a representative capacity from any personal liability, and only makes the funds in the hands or under the control of such representative liable. The object of this section undoubtedly was to encourage the investment of trust funds in this class of corporations by relieving the trustees from personal liability.

In this case I think the court can only adjudge the defendant to pay in due course of administration.

The demurrer to the bill is therefore overruled.

COWELL v. LAMMERS and others.

Circuit Court, D. California. August 11, 1884.

MINERAL LAND—ISSUE OF PATENT EXCEPTING—INTRUSION BY CLAIMANT—COLLATERAL ATTACK ON PATENT.

On June 27, 1867, under the acts of congress of July 1, 1862, and July 2, 1864, a patent, regular on its face, was issued for the N. E. $\frac{1}{4}$ of section 17, township 9, range 9 E., Mt. Diablo base and meridian, to the Central Pacific Railroad Company, to aid in the construction of its road. The patent expressly excepted all mineral lands, should any be found within the tract conveyed, but there was nothing to indicate that any part of such land was mineral land. In 1873 the company conveyed the land to M., who entered into possession, occupied, fenced, built upon, and cultivated the land until 1877, when he sold it to C., who also went into possession and cultivated and used the land. In 1881 L. entered upon a part of the land, against the will of C., and, claiming that it was mineral land, took up a mining claim thereon. *Held*, that L. could not, by this unlawful intrusion, initiate a right to a mining claim, and that the patent was conclusive when collaterally called in question; following *Atherton v. Fowler*, 96 U. S. 513, and *Steel v. Smelting Co.* 106 U. S. 447; S. C. 1 Sup. Ct. Rep. 389.

In Equity.

D. Johnson and W. H. Beatty, for complainant.

George G. Blanchard, for defendants.

SAWYER, J. This is a suit in equity to enjoin the defendants from committing a trespass in the nature of waste, in working a gold mine on the N. E. $\frac{1}{4}$ of section 17, township 9 N., range 9 E., Mt. Diablo base and meridian. The quarter section is a part of a section designated by an odd number within the limits of the grant made by congress to the Central Pacific Railroad Company, to aid in the construction of said company's road, by the act of July 1, 1862, (12 St. 489,) as amended by the act of July 2, 1864, (13 St. 356.) The road having been completed in accordance with the provisions of said acts of congress, a patent in the usual form was issued to the Central Pacific Railroad Company on June 27, 1867. The granting clause of the patent is as follows:

"Now know ye, that the United States of America, in consideration of the premises, and pursuant to the said acts of congress, have given and granted, and by these presents do give and grant, unto the said Central Pacific Railroad Company of California, and to its assigns, *the tracts of land situated as aforesaid and described in the foregoing, yet excluding and excepting from the transfer, by these presents, 'all mineral lands,' should any such be found to exist in the tracts described in the foregoing; but this exception and exclusion, according to the terms of the statute, shall not be construed to include coal and iron land.*

"To have and to hold the said tracts, with the appurtenances, unto the said Central Pacific Railroad Company of California, and to its assigns, forever, *with the exclusion and exception as aforesaid.*"

On March 13, 1873, the Central Pacific Railroad Company duly conveyed the said quarter section, with other lands, to Daniel Mc-

Carty. McCarty went into the actual possession and occupation of the land, claiming title under the said United States patent and subsequent conveyance to himself. He fenced the lands embracing said quarter of section 17; erected a house, barn, and other out-buildings and improvements upon the said quarter section; cultivated portions of it in grain and other products used in his family, including his employes; burned lime on it for sale; and used the rest of it for hay and pasturage, having a large number of cattle, sheep, and hogs upon the land. He was thus in the actual possession and occupation of the land in question, having it under fence and in actual use from the time of his purchase, in 1873, till November 24, 1877, on which day he duly conveyed to the complainant, Cowell, who, upon receiving such conveyance, went into the actual possession and occupation of the said land, which, by and through his employes, he has ever since possessed, occupied, and used for purposes similar to those to which they were applied by his grantor, McCarty.

The defendant, by the permission of complainant, had erected a cabin on a portion of the lands of complainant other than that part upon which the trespass is alleged to have been committed, and outside said quarter of section 17, in which he had lived some years by complainant's permission, though without any lease; from time to time, as his services were required, working for complainant. In August, 1881, defendant, without the consent and against the will of complainant, entered upon the particular portion of the land now in question, assuming it to be public mineral land, prospected for a mine, and located a mining claim in pursuance, as he claims, of the rules and regulations of miners of the district, and of the Revised Statutes of the United States, upon the subject, upon what he now claims to be a gold-bearing quartz lode. He insists that a valuable gold mine has been found to exist at the point of the location claimed; that the act of congress did not grant "mineral lands" to the Central Pacific Railroad Company; that the patent, although covering the land in terms, excepts from its operation any lands that may be found to be mineral; that the lode in question did not pass to the railroad company either by the act of congress or the patent; and that it was, at the date of his location, public "mineral land," open to exploration and location by him. There is a good deal of testimony tending to show that there was a placer mine on the quarter section which had been exhausted and abandoned before the railroad grant attached; also that there had been some prospecting for quartz, and some found, but that it did not appear to be of sufficient value to pay for working, and that all work of the kind had also been abandoned before the rights of the railroad company attached; and that nothing had been afterwards done, except by the grantees in the patent, and that of very little consequence, to find, work, or develop a mine, till the entry and acts of defendant in 1881, complained of.

An application to the land-office to purchase the mine claimed to

have been located by defendant on the quarter section in question, made subsequently to the location of defendant, was rejected, on the ground that the land had already been regularly patented to the Central Pacific Railroad Company, at a time when there were no known valuable mines upon them, and that, notwithstanding the clause in the patent excluding mineral lands, the exclusion did not embrace mines that might be subsequently discovered and developed, and that, in issuing the patent to the railroad company, the jurisdiction and powers of the land-office had been exhausted. The commissioner of the general land-office, in affirming the decision of the local office in rejecting the application, says:

"Applicant claims that said Marble Valley quartz mine was discovered in July, 1881. He further claims, that, having complied with the provisions of section 2325, United States Revised Statutes, his application should have been received. Applicant's counsel argue that mineral lands did not pass to the railroad company by said patent issued under the acts of July 1, 1862, and July 2, 1864, and in support thereof refer to numerous decisions of courts and of this department. The only question arising here is, were these lands, at date of the patent to the railroad company, mineral, so that they should have been excluded from such patent? If so, then the patenting was an error of this office, or fraud was practiced by the railroad company. If not, then the title to the lands vested at date of the patent in the railroad company, and this office has no further jurisdiction in the premises. It is, therefore, plain that the decisions cited by the applicant's counsel do not apply to the case in hand. Said township was surveyed in 1866, and section lines were run. This was at a date when subdivisinal lines of townships were not run in the survey of *mineral lands*. Provision for extending the public surveys over all the mineral lands was not made until the act of July 9, 1870. The fact of the survey of said section 17 in 1866, and that the plat of the survey of the township or the field-notes fail to show section 17 to contain 'valuable mineral deposits,' make a *prima facie* case in favor of the agricultural character of the section. It is not alleged, nor does it appear anywhere in the case, that any valuable mineral was discovered on section seventeen prior to the issuing of the patent.

"Under the grant to the state of California of sections sixteen and thirty-six for school purposes, the title vests in the state upon survey, if subsequent to the act, if the lands were not known to be mineral at that date. Sick. Min. Dec. 246. 'All mineral deposits discovered upon lands after United States patent therefor has issued to a party claiming under the laws regulating the disposal of agricultural lands, pass with the patent, and this office has no further jurisdiction in the premises.' Copp, U. S. Min. Lands, 121. This is an established principle recognized by this office, and applying to railroad companies claiming agricultural lands, as well as to any other party claiming under the laws regulating the disposal of agricultural lands. The excepting clause in the patent to the railroad company, excluding all mineral lands, other than coal and iron lands, from the transfer, *is construed to mean lands known to contain valuable minerals prior to the issuing of the patent. Subsequent discoveries would not affect the title of the company to the lands;* it would be entitled to the lands thus discovered. The patent in this case appears to have been regularly issued, and no error in this office in issuing the same, or fraud on the part of the railroad company, is alleged or claimed. * * * The title to the lands applied for is vested in the railroad company, under its said patent dated June 27, 1867, and the land is not subject to further disposal by the United States."

The complainant insists that, in view of the indisputable facts appearing in the case, the defendant is not in a position which entitles him, in this proceeding, to collaterally assail the validity of his title under the patent for two reasons; and, if I rightly comprehend the decisions of the supreme court upon similar questions, he is clearly right in this position. In *Atherton v. Fowler* the supreme court distinctly held that no right of pre-emption can be established by a settlement and improvement on a tract of land conceded to be public, where the pre-emption claimant intruded upon the actual possession of another, who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract; that such an intrusion is but a naked, unlawful trespass, and cannot initiate a right of pre-emption. 96 U. S. 513. This decision was affirmed in *Hosmer v. Wallace*, 97 U. S. 579, and *Quinby v. Conlan*, 104 U. S. 421. In the latter case the court says:

"A settlement cannot be made upon public land *already occupied*; as against existing occupants, the settlement of another is ineffectual to establish a pre-emption right. Such is the purport of our decisions in *Atherton v. Fowler*, 96 U. S. 513, and *Hosmer v. Wallace*, 97 U. S. 575." 104 U. S. 423.

The laws no more authorize a trespass upon the actual possession and occupation of another, for the purpose of initiating a pre-emption right to take up and acquire under the statutes the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land. The law does not encourage or permit, for any purpose, unlawful intrusions and trespasses upon the actual possession and occupation of another. To permit a right or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such a character as to greatly disturb the public tranquillity. We are, unfortunately, not without painful examples of this kind in this state. Actual possession and occupation of lands in good faith, public or otherwise, have always, as against naked trespassers, been regarded as evidence of title, and fully protected by the courts of this state from its first settlement. In this case the defendant intruded upon the actual possession and occupation of the complainant, prospected for and located a supposed mine upon lands which had been inclosed with a substantial fence, and in the actual continuous possession, occupation, and use of the complainant and his immediate grantor for eight years, claiming title under a patent of the United States, regularly issued 14 years before. He is a mere stranger and trespasser upon the actual possession and occupation of the complainant, without any right recognized by the law of the land, and is not in a position to assail the complainant's title. If this is not the rule established by the decisions of the supreme court, then I am unable to comprehend their import. See, also, *Doll v. Meador*, 16 Cal. 320 *et seq.*

The patent is entirely regular and valid upon its face, as well as

when compared with the record in the land-office. If defeated, it must be upon parol evidence of matters *dehors* the patent and record, developed subsequently to the issue of the patent. To permit every intruder, upon his own notions of propriety, to collaterally assail a patent, regularly issued, on the grounds and under the circumstances disclosed in this case, would be intolerable. If any one was injured by the issue of complainant's patent for lands, since ascertained by exploration to be mineral lands, and for that reason not intended to be embraced in the congressional grant, it was the United States, not the defendant. No vested right of his was invaded or affected by the issue of the patent, he having at that time acquired no interest. He had no equity then, and he has none now, that entitles him to litigate the title of complainant derived from his patent, and actual possession thereunder. His present equity rests alone upon a trespass committed upon the actual possession of complainant.

I also think it clear that the defendant is not in a position to collaterally assail complainant's title resting upon the patent, under the rule established by the supreme court in *Steel v. Smelting Co.* 106 U. S. 447; S. C. 1 Sup. Ct. Rep. 389; *Smelting Co. v. Kemp*, 104 U. S. 640-647, and other cases cited in those cases. It is sought to distinguish this case from the smelting company cases cited, on the ground of the clause in the patent now in question, "yet excluding and excepting from the transfer of these presents 'all mineral lands,' should any be found to exist in the tracts described in the foregoing. * * * To have and to hold * * * with the exclusion and exception aforesaid." In my judgment, the insertion of this clause in the patent issued in no respect affects the rule as established by the supreme court in those cases, or its applicability to this case. The act granting to the railroad company "the alternate sections of the public lands designated by odd numbers," provided "that all mineral lands shall be excepted from the operation of this act;" that is to say, are not included in the legislative grant. 12 St. p. 492, § 3. The act itself is a present grant, and makes the exception. So the act to extend to California the right of pre-emption to unsurveyed public lands, in like manner provided "that the provisions of this section shall not be held to authorize pre-emption and settlement of mineral lands, which are hereby exempted from the provisions of this act," (Id. p. 410, § 7;) and by section 2258, Rev. St., mineral lands are also reserved from sale. In all these cases the act of congress itself, in like terms, excludes mineral lands. In neither case does it provide that any clause excepting mineral lands should be inserted in the patent. Yet the clause, for some reason, is inserted in the railroad grants, while it is omitted in pre-emption and other patents, so far as such patents have come under my observation. Section 4 of the act granting lands to the railroad company provides that upon the certificate of the commissioner provided for, that a

prescribed number of miles of road has been completed in accordance with the provisions of the act, "patents shall issue conveying the right and title to said lands [the alternate sections designated by odd numbers] to said company on each side of the road, as far as the same is completed, to the amount aforesaid; and patents shall, in like manner, issue as each forty miles of said road and telegraph line are completed." There is no express authority in the statute to issue a patent covering known mineral lands at all, and no more authority to insert a clause in a patent issued, excepting or excluding therefrom, generally and indefinitely, without describing them so as to identify the exceptions made by the patent, "mineral lands," should any be found to exist in the tracts described. There is just as little authority for one as the other; as little authority for inserting the clause of exclusion, as for issuing any patent at all embracing mineral lands. Under the statute, it is as clearly the duty of the officers authorized to issue patents to the railroad companies to ascertain whether the lands patented are embraced in the congressional grant and patentable, or are mineral lands and not patentable, as it is in the case of a pre-emption, homestead, or other entry and sale of public lands, to ascertain the facts authorizing the issue of the patent.

The act of congress, as long ago as 1796, provided that "every surveyor shall note in his field-book the true situations of *all mines, salt-licks, salt-springs, and mill-seats* which shall come to his knowledge. * * * These field-books shall be returned to the surveyor general, who shall thereupon cause a description of the whole lands surveyed to be made out, and transmitted to the officers who may *superintend the sales.*" 1 St. p. 466, § 2. The object, doubtless, is to enable the officers in charge to determine whether the lands are patentable or not. This provision has been in force ever since, and it was carried into the Revised Statutes, (section 2395.) So, also, the mineral lands, at the date of the survey of these lands, were not authorized to be surveyed by running the section lines. Thus the government has provided means to enable the land-office to determine the character of the lands, and whether or not they are of the character granted by the acts, or authorized to be sold or otherwise disposed of. No authority is given to issue patents in any of these cases to mineral lands excepted in the acts of congress, and this fact necessarily involves the duty to determine whether lands for which patents are sought are mineral or not, and it is presumed that that duty was duly performed. In this case, the evidence shows that there was nothing in the records of the land-office to indicate that the lands in question were mineral; and the fact that they had been surveyed at a time when mineral lands were not authorized to be surveyed, and the plats filed without designating the lands as mineral, is *prima facie* evidence that they were not mineral in character, and were included in the congressional grant and patentable as such. The question as to their patentability was, therefore, determined on

the surveys, records, and evidence. And the patent makes out, at least, a *prima facie* case of title in complainant.

The issue of the patent to the Central Pacific Railroad Company, then, notwithstanding the unauthorized, general, and indefinite clause of exception and exclusion "of mineral lands, should any be found to exist in the tracts described," now claimed by defendant to leave the facts open for contest, is just as clearly a determination by the officers of the land department that the lands described in the patent are not mineral, and are a part of the lands granted by the act, as in the case of a patent issued to a pre-emption homestead claimant, or other purchaser, under acts of congress having similar exceptions, without any similar clause of exception and exclusion inserted in the patent. The lands are either patentable under the act or they are not. If patentable, the issue of a patent is authorized. If not patentable, it is unauthorized, and the issue of a patent is, clearly, as conclusive evidence of the determination of the fact of patentability, upon a collateral attack, in the one case as in the other. Suppose it should afterwards turn out that all is mineral land. The exception would be as broad as the grant, and be void as an exception. Is it any the less so, in this class of cases, as to a part? No provision of the statute has been brought to my notice authorizing any distinction in these different classes of patents, or authorizing any vague or uncertain exception, leaving the question as to what is granted and what is not, open to contest upon parol evidence of matters *dehors* the patent subsequently developed and brought to light. The land department in this very case, as in cases of patents to pre-emptioners, homestead claimants, and other purchasers of the public lands, have acted, and I think correctly, upon the idea that patents to lands not known to be mineral lands at the time the patent issued, carry the title to all mines subsequently discovered in the lands, notwithstanding the reservation from sale of mineral lands in the acts of congress. By the words "mineral lands" must be understood lands known to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent. And the United States courts which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. *P. C. M. & M. Co. v. Spargo*, 8 Sawy. 645; S. C. 16 FED. REP. 348. There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent. The supreme court has not yet had occasion to decide the point as to the effect on a patent of a discovery of a valuable mine in lands subsequent to the issue of a patent. Any other construction would be disastrous in the extreme to the holders of lands in California under United States patents. If land which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States 15

years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and, a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee or his grantees can rest in security, would be but a delusion and a snare. Congress could never have contemplated such a construction and execution of the acts in question. In much the larger portion of the mining regions of the state, the placer mines were worked out, exhausted of their mineral, and utterly abandoned for mining purposes years ago, and since their exhaustion and abandonment they have been taken up by and patented to pre-emptioners, homestead claimants, railroad companies, and other purchasers, as agricultural lands, and have been fenced, cultivated, grazed, planted with orchards and vineyards, built upon, occupied, and enjoyed by a large, thriving, prosperous, contented, and happy population. Those who were once miners, after working out their mines, have themselves purchased as agricultural lands the lands which they had thus exhausted of their mineral wealth, and have now become agriculturists, farmers, stock-raisers, fruit and wine producers, etc. The very township in which the land in question is situated, and of which it forms a part, affords a striking illustration of the facts stated. According to the record of the land-office in evidence, said township 9, which is situated in the mining region, contains 22,970.76 acres of land, of which there have been sold and patented, under pre-emption and homestead laws, 8,957.77 acres; granted and patented to the railroad company, 9,843.29 acres; applied for under homestead laws and not yet patented, 1,043.13; sold under the mining laws as placer mines, 110 acres; as quartz mines, .93 of an acre; and as marble mines, 13.47 acres. Are the owners of all these lands, thus sold, to be for all time liable to have their possession, held under patents upon their face regularly issued, intruded upon by any trespasser who chooses to prospect his orchard or vineyard or pasture for a mine, and when a mine shall be found have it taken from him by the intruder under the claim that the patent is void on the grounds insisted upon in this case, that the land was not subject to sale in the case of purchasers, or was not granted in the case of the railroad company? If such be the case, there is certainly a serious defect in the laws, or in their execution. I am unable to discover or believe that such a position is sanctioned by the laws, or by the decisions of the supreme court. The exception of mineral lands from the grant in the act of congress is explicit. There is no express authority, no provision at all, requiring or authorizing this exception to be repeated in the patent. Lands patentable under the grant, and no others, are authorized to be patented. If the exception in the patent is no broader in its signification than the statute, it adds nothing to and takes nothing from the effect of the statute

itself in this respect, or to the effect of the patent issued in pursuance of the statute. If it is broader than the statute, then it is wholly unauthorized by law, and as to the part which goes beyond the statute, at least, is utterly void. A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant itself whether anything is granted or not, and, if anything be granted, what it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not. The most that can be said, then, is that the clause of exception and exclusion in the patent in no way affects the rights of the parties given by the statute, in no way enlarges or restricts those rights, and the same force and effect must be given to the patent on a collateral attack as would be given to it had the clause been omitted, as both classes of patents would depend upon and be controlled by the same or similar statutory provisions. We have seen, in the cases cited from the supreme court reports, that *patents* issued under the various acts of congress excepting and reserving mineral lands from sale or grant, in precisely similar language, but which omit the clause of exception and exclusion found in the patent in question, have always been held by the supreme court to be unassailable collaterally. The same rule must be held applicable to the patent in question and those like it.

If the foregoing views are correct, it would have been better if no distinction had been made between patents issued under different acts of congress having similar exceptions; better if no such exception had been inserted in the patent. The exception inserted in this class of patents, upon the view adopted, only affords a pretext for collaterally assailing its validity, thus inviting and stimulating litigation. Circumstances from the beginning, in this state, seem to have conspired to afford an infinite variety of pretexts, more or less plausible, for assailing all classes of patents to land issued by the United States, and on that ground to create a very general and widespread feeling of insecurity and distrust in regard to land titles. The sooner it comes to be a generally recognized principle that a United States patent, regular upon its face and upon the record, issued in the forms prescribed by the laws, means something,—that it is unassailable collaterally, or even with success directly, by parties having the proper *status*, except upon clear and indisputable grounds and evidence,—the sooner confidence in land titles will be re-established, and the better it will be for the good order, tranquillity, prosperity, and happiness of the people of California.

In my judgment, the defendant is not in a position, in this suit, to assail or question the title of the complainant resting upon his pat-

ent, and his possession under it, for the reasons stated on all the points discussed in the opinion. The view taken upon the points discussed renders it unnecessary to consider the evidence as to whether the land in dispute is in fact mineral land, or, if it is, whether its mineral character was, in fact, known at the date of the patent.

Let a decree be entered for complainant for a perpetual injunction, in pursuance of the prayer of the bill, with costs.

TAYLOR and others v. ROBERTSON and others.

(Circuit Court, N. D. Illinois. April 14, 1884.)

1. BANKRUPTCY—ESTATE OF ASSIGNEE IS THAT WHICH BANKRUPT HELD WHEN PETITION WAS FILED.

It was the purpose of congress, as evidenced by sections 5044, 5046, Rev. St., tit. "Bankruptcy," to clothe the assignee of the bankrupt with the latter's estate whenever such assignee should be appointed and a deed made to him in the same condition and plight as such estate was in when the petition in bankruptcy was filed.

2. SAME—SALE MADE BETWEEN FILING OF PETITION AND ADJUDICATION OF BANKRUPTCY—RIGHTS OF ASSIGNEE.

A sale made between the date of the adjudication of bankruptcy and the appointment of the assignee is at least voidable as against the assignee or those claiming under him.

Creditor's Bill.

McCoy, Pope & McCoy, for complainants.

Paddock & Aldis, for defendants.

BLODGETT, J. The questions in this cause arise upon the pleadings and proofs in a creditor's bill and several amended and supplemental bills filed thereafter. On the thirtieth of July, 1877, complainants Taylor and Bruce recovered, on the law side of this court, a judgment against William Scott Robertson for the sum of \$21,786 and costs. On this judgment execution was duly issued to the marshal of this district, and returned "no property found," January 24, 1878; a creditor's bill in the usual form was filed by complainants, to which Francis B. Peabody, Benjamin E. Gallup, and others were made defendants, with the allegation "that they, or some one or other of them, have in their possession or control personal property, and hold title to real estate which belongs to said defendant Robertson, or in which he is some way beneficially interested." Due service of process was had on the defendants in this bill before the return-day thereof, and the defendant Peabody demurred to the bill for want of equity, and in March, 1878, his demurrer was sustained. No answer seems to have been filed by the other defendants, and no proceedings taken, until September 17, 1881, when an amended and supplemental bill was filed, and since then other amendments and

supplemental bills have been filed, making Mehitable Green, widow of David R. Green, deceased, William W. Crapo, and Charles W. Clifford, trustees of the heirs of said David R. Green, and said Robert B. Green, Susan G. Page, Horatio N. Green, and Francis B. Green, heirs of said David R. Green, and E. A. Cummings, defendants; and these defendants have duly answered. The controversy, which has finally been brought to a hearing upon these amended and supplemental bills and answers, has reference to the validity of a sale under a trust deed, made by the defendant Peabody, and concerns only the property covered by this trust deed,—all the other matters in the original and amended bills having been abandoned by complainants.

The facts appearing in these pleadings and proofs, which seem to me necessary to consider for the purpose of disposing of the case, are: That on or about April 1, 1871, one Nathan S. Grow, of the city of Chicago, borrowed of David R. Green, now deceased, then of New Bedford, Massachusetts, \$35,000, payable in five years from said date, with interest at 8 per cent. per annum, payable semi-annually, and to secure the payment thereof executed to the defendant Benjamin E. Gallup, as trustee, a trust deed conveying a valuable tract of land situated on the corner of West Madison and Sheldon streets, in this city, and described in the pleadings and proofs as the "Jefferson Park Hotel property." Some time in 1876 Grow sold and conveyed this property to the defendant Robertson, and Robertson assumed and agreed to pay this Green incumbrance. On the second day of April, 1877, Robertson, having negotiated with Robert R. Green for an extension or renewal of the Grow indebtedness for the further term of three years, executed and delivered to the defendant Peabody a trust deed of the same property, securing the payment of the said sum of \$35,000 in three years, and interest thereon at the rate of 7½ per cent., payable semi-annually, with full power to the trustee to sell the property so conveyed, in case of default in payment of the indebtedness so secured, after advertising the same in the manner provided by the trust deed, and out of the proceeds to pay the indebtedness so secured, and the costs of such sale, together with any money advanced for payment of taxes, assessments, or insurance. The trust deed also contained a clause that in case of default in the payment of interest, when the same should fall due, and for 30 days thereafter, or in case the premises, or any part thereof, should be sold for taxes or assessments thereon, the whole indebtedness should, at the election of the holder thereof, become immediately due and payable, and the trustee might be required to sell in the same manner as though the whole principal had become due and remained unpaid by lapse of time. It also appears that on the thirtieth day of August, 1878, Robertson, being in default in payment of the interest which had accrued in the preceding October and April, at the urgent request and direction of said David R. Green, then the holder of said indebtedness, delivered to Mr. Peabody, the trustee, the possession of

the property, and the tenants duly attorned to Peabody. It also appears that on the thirty-first day of August, 1878, the day after placing Mr. Peabody in full possession of the premises, Robertson filed his voluntary petition in bankruptcy in the United States district court of this district, and was duly adjudged bankrupt, in pursuance of such petition, on the seventh day of September, 1878, and on the twenty-fourth day of July, 1879, Bradford Hancock was duly appointed assignee of the bankrupt's estate, and a deed made to him by the register conveying to him all the estate of the bankrupt. On the seventeenth day of June, 1880, said assignee in bankruptcy, pursuant to the order of the district court, sold and conveyed, by deed, to Lorin Grant Pratt, all the right, title, and interest of the bankrupt, and his right as assignee in and to this Jefferson Park Hotel property, with other property, for the gross sum of \$3,305, subject to all liens, taxes, and incumbrances. On the fourth day of January, 1881, an *alias* execution was issued on the Taylor and Bruce judgment, directed to the marshal of this district to execute, and the marshal levied said execution on this hotel property, and the same was, on the twenty-seventh day of January, 1881, sold by the marshal, in pursuance of said execution and levy, to Lorin Grant Pratt, for the sum of \$5,000, for which a certificate was duly issued by such marshal. It further appears that Mr. Pratt, in making these purchases at the assignee's and marshal's sales, acted solely as attorney and trustee for and in behalf of the judgment creditors Taylor and Bruce, and that the title so vested in Mr. Pratt, by virtue of these purchases, was taken by him, as naked trustee, for the benefit of his clients. On the fourth day of September, 1878, Mr. Peabody, as trustee, caused an advertisement to be published in the *Chicago Weekly Journal*, a weekly newspaper published in the city of Chicago, to the effect that he would sell this "Jefferson Park Hotel property" at public auction, pursuant to the powers in his said trust deed, on the seventh day of October, 1878, by reason of default which had been made by Robertson in the payment of the semi-annual interest falling due on the third of October, 1877, and the second of April, 1878, upon the indebtedness secured by said trust deed; and on the seventh of October, 1878, said Peabody, as such trustee, in pursuance of such advertisement, sold said premises at public auction, and the same were struck off and sold to David R. Green, and a deed of conveyance duly made to him by such trustee. It further appears that said David R. Green, the purchaser of said property, has since died, and that the defendants Mehitable B. Green, his widow, and Robert B. Green, Susan G. Page, Horatio N. Green, and Francis B. Green, the children and heirs at law of said David R. Green, and defendants W. W. Crapo and Charles W. Clifford, as trustees of said heirs, are interested in said property, and claim to hold a valid and absolute title to said premises by virtue of the deed from Peabody, as trustee, to said David R. Green.

The amended and supplemental bills contain allegations charging that this sale was made by reason of a fraudulent and collusive understanding between Robertson and the trustee, by which he, Robertson, was to have the right to redeem the premises in question on payment of the indebtedness secured by this trust deed, and is therefore void as against the complainants, who were then judgment creditors of Robertson, and had a vested lien on said property by virtue of their judgment. Also that the notice, under which the trustee made the sale, was not properly published, as required by the terms of the trust deed, and that the sale was bad from the fact that the property was sold *en masse*, and not in parcels, and was made at a price grossly below the value of the property. It is also charged that this sale was void for the reason that it was made after Robertson was adjudged bankrupt, and before an assignee for his estate was appointed; and complainants claim to now be the equitable owners of all the estate and interest of the assignee in the property, by virtue of the purchase made by Mr. Pratt in their behalf.

I do not think the proof sustains the allegation of a collusive arrangement or understanding between the trustee and Robertson that Robertson was to have the right to redeem the property from the trustee's sale on payment of the debt and interest. Mr. Peabody denies any such agreement, and the proof tending to show it is too vague and uncertain to form the basis for relief on that ground. The proof, however, does show that Green, for some months before the sale, had been insisting upon the payment of his interest, and finally informed Robertson that he must turn over the rents of the premises to the trustee, or he should proceed to foreclose; and I have no doubt that Robertson believed that, having put the trustee in full possession, no foreclosure would be insisted upon, and that, in some way to be worked out between them after Robertson was through with his bankruptcy proceedings, he would be allowed to redeem on payment of the debt, interest, and taxes.

It may, I think, also be urged with much force that, inasmuch as the indebtedness was not due save at the election of Green, by reason of default in the payment of interest, and as the property was yielding an income fully adequate to meet accruing interest, taxes, and insurance, there was no equitable reason for forcing the property to sale after the trustee had been put in possession as mortgagee in possession. Mr. Green, or Mr. Peabody for him, could have made all needful repairs or improvements to secure or augment the income, —at least, until the debt was fully due; and the sale made, under the circumstances, might properly be deemed so harsh and unconscionable a proceeding as to justify the interposition of a court of equity; but as I do not propose to determine the case on this point, I only suggest it.

The notice seems to have been a sufficient compliance with the conditions of the trust deed. By the terms of the trust deed, the

trustee was empowered to sell the premises entire, without division, or in parcels, and in such parcels as he might elect; which, it seems to me, is a sufficient answer to the allegation as to the sale of the property *en masse*. Where a trustee is clothed with so ample a discretion as he was under this trust deed, a clear case of fraud, or such diminution in price as amounts to a willful fraud on the debtor, or those claiming under him, must, in my judgment, be made out in order to justify setting aside a sale for this reason. Some clear and tangible injustice must have resulted from the sale in bulk, in order to entitle a party in interest to call on a court of equity to set aside a sale made under such a power. As to the allegation that the property was sacrificed, or sold at too low a rate, this question may be considered further on.

The real question, it seems to me, is, was this sale, made after Robertson, the grantor in the trust deed, had been adjudicated a bankrupt, and before the assignee of his estate in bankruptcy had been appointed, a valid sale? In other words, did not bankruptcy suspend the exercise of the powers delegated by the trust deed to this trustee until there was an assignee chosen and qualified to act for this bankrupt's estate?

It will be remembered that Robertson filed his petition in bankruptcy on the thirty-first of August, 1878, and that no assignee in bankruptcy was appointed until June, 1879, and that the sale now challenged took place on the seventh of October, 1878, a little more than 30 days after the filing of the petition in bankruptcy. By section 5044, Rev. St., tit. "Bankruptcy," it is provided:

"As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

Section 5046 of same title provides:

"All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made,—shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

It would seem to have been the purpose of congress, as evidenced by these sections of the bankrupt law, to clothe the assignee of the bankrupt with his estate, whenever such assignee should be appointed and a deed made to him, in the same condition and plight as when the petition in bankruptcy was filed.

In *Bank v. Sherman*, 101 U. S. 403, the supreme court said:

"The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civilitur morbus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction."

In *Re Grinnell*, 9 N. B. R. 29, it was held by Judge BLATCHFORD, after a careful analysis of the provisions of the bankrupt law touching the powers and estate vested in the assignee,—

"That the assignee is the only person who can represent the creditors other than the particularly secured creditor. Whether such other creditors are wholly unsecured or insufficiently secured, they have an interest in seeing that the debt of the particular secured creditor is duly proved, and is not fraudulent or illegal, and that the securities held for it are applied on it at their proper value, whether such value is ascertained by agreement between such particular secured creditor and the assignee, or by a sale. Before such application of the securities is made, the assignee has a right, on behalf of such other creditors, to elect whether he will redeem the pledged property by paying the debt and taking the property, or whether he will ask to have it sold subject to the lien, or whether he will give it up to the secured creditor on receiving an agreed sum as its excess of value over the debt. Nothing of all this can be done until there is an assignee. But the distinct principle of these provisions is that all valid liens which exist on the property of a bankrupt when the proceedings in bankruptcy are commenced, are preserved and will be respected by the bankruptcy court, and enforced and allowed to be paid out of the proceeds of the property on which they are liens. It is, however, confided to the bankruptcy court to determine whether the debt is valid, and whether the lien is valid, and to regulate the disposition of the property on which the lien is claimed. For this purpose, in involuntary cases, power is given to the court, by the fortieth section, to restrain the debtor and any other person from making any transfer or disposition of any part of the debtor's property not excepted by the act from the operation thereof, and from any interference therewith. This power is to be exercised when the order to show cause is issued, and is intended to restrain the disposition of the debtor's property until there can be an adjudication of bankruptcy, and proper proceedings thereafter. The same effects follow from the filing of a voluntary petition, for the debtor, in filing it, brings all his property under the protection and within the control of the court. * * *

"It nevertheless remains true that the filing of a petition in bankruptcy, whether voluntary or involuntary, (if followed by an adjudication and the appointment of an assignee,) operates, from the time of such filing, as a practical restraint on a pledgee of the property of the bankrupt, who is notified of such filing, from disposing of it otherwise than at his own risk, until the bankruptcy court can act in the premises. * * * The moment the pledgee

is adjudged bankrupt, the pledgee can no longer deal with him, as continuing to be the owner of the property, or deal with the property as continuing to be the property of the pledgeor. If a demand of payment be necessary to be made of the pledgeor, or if a notice of sale of the pledged property be necessary to be given to the pledgeor, such demand cannot be made on or such notice given to the pledgeor after the adjudication, so as to cut off any rights which will belong to the assignee. It is as if the pledgeor were to die, and there were to be an interval between his death and the appointment of his executor or administrator, during which there would be no one to represent the estate of the pledgeor and to receive a demand or notice."

Also, in *Phillips v. Sellick*, 8 N. B. R. 390, it was said by Judge LONGYEAR—

"That all the creditors of the bankrupt, secured as well as unsecured, become and are at once, by virtue of the bankruptcy, parties to the proceeding, and they and their debts are thereby brought under and subject to the sole and exclusive jurisdiction and control of the bankruptcy court."

The same principle was applied by Judge TREAT in 2 N. B. R. 301, and by Judge LOWELL in *Foster v. Ames*, Id. 455; the learned judge in the latter case saying:

"The bankruptcy of the mortgagor changes or may change the remedies of the parties, although it preserves all their rights of property and securities."

In *Yeatman v. Savings Inst.* 95 U. S. 764, the supreme court said:

"Among the rights so vested at once in the assignee by virtue of the adjudication in bankruptcy, and of his appointment as such assignee, is the right to redeem the property or estate of the bankrupt. And, in order that it may be exercised for the benefit of creditors, the assignee is given express authority, under the order and direction of the court, to redeem and discharge any mortgage, or conditional contract, or pledge, or deposit, or lien, upon any property, real or personal, whenever payable, and to tender due performance of the conditions thereof, or to sell the same, subject to such mortgage, lien, or other incumbrance."

In *Conner v. Long*, 104 U. S. 228, the doctrine of *Bank v. Sherman* is reiterated, the court saying:

"Until an assignee is appointed and qualified, and the conveyance or assignment made to him, the title to the property, whatever it may be, remains in the bankrupt. It is equally true that when the assignment is made it operates retrospectively. The title of the bankrupt in the interval is defeasible, and, whenever the assignment is made, is divested as of the date when the petition was filed."

I might multiply citations, but it seems to me enough has already been quoted to substantiate the position that a sale made between the date of the adjudication of bankruptcy and the appointment of the assignee is at least voidable as against the assignee or those claiming under him.

The sale under this trust deed could only be made after the notice published in the manner provided by the instrument. The object of this notice was to inform the mortgagor, and those claiming under him, that a sale would be made. After the mortgagor is adjudged bankrupt, and until there is an assignee of his estate duly appointed and qualified, as provided by the bankrupt law, who is there upon

whom this notice can be operative? The bankrupt has no power to act in the premises; his control over the estate is at an end; he cannot pay off the incumbrances; he cannot negotiate with the mortgagee for an extension; he cannot obtain a new loan with which to liquidate the debt, and thereby prevent the sale; he can, in fact, do nothing except to appeal to the court in bankruptcy to interpose for the protection of the property; and his failure to do this waives no right of the assignee when appointed.

In view of the wrong which had been perpetrated upon various estates by the exercise of these powers of sale after the death of the mortgagor or grantor in trust deeds and sale mortgages, the legislature of Illinois, in 1869, provided that no sale should be made under a power after the death of the mortgagor. The principle stated by the supreme court in *Bank v. Sherman*, is, in effect, that the adjudication of bankruptcy is the civil death of the bankrupt, so far as the management of the estate of the bankrupt is concerned, and his estate must remain *in statu quo* until an assignee is appointed who can act for it.

If section 5044 means anything, it seems to me it must and does mean that when the assignee becomes clothed with the title by virtue of a deed from the judge or register, he takes the title precisely as the bankrupt left it when the petition in bankruptcy was filed; all that has been done in the interval between the filing of the petition and the deed to the assignee goes for naught as against the assignee, as it would as against the bankrupt, if no adjudication of bankruptcy should be made and the petition be dismissed.

It is true that the district court in bankruptcy may, on application made to it, either by the bankrupt or any person interested in his estate, in the exercise of its discretion, authorize a trustee or mortgagee to proceed and sell the property covered by the mortgage or trust deed under the powers, before the appointment of an assignee; but I am very clear, in the light of the statute and the decisions, so far as they have gone, that a sale made under a power like this, after adjudication, and before the appointment of an assignee, is voidable, either on the application of the assignee or those claiming under him, unless it is made by leave of the court.

In this case it appears that the assignee sold the equity of redemption of the bankrupt in this property on the seventeenth of June, 1880, and an amendment to the bill challenging the validity of the trustee's sale was made on the seventeenth of September, 1881. The position of the parties, so far as diligence is concerned, is substantially the same, perhaps, for the purpose of this question, as if no bill had been filed until the seventeenth of September, 1881, when the first amendment and supplemental bill was filed, which was nearly three years after the adjudication in bankruptcy, and nearly two years after the assignee had been appointed. There is no proof that any such change of interest in the property has taken place as to pre-

clude this court from making substantially the same decree as it could have made if the bill had been filed immediately after the sale, and during the life-time of David R. Green. It appears that David R. Green died intestate, and the property in question descended to his heirs at law; but by some means it also appears to have been vested in certain trustees for the benefit of their heirs at law. These persons are not purchasers, but heirs possessing no greater equities than David R. Green himself would possess, if living; they have paid no value for this property, but take and hold the title subject to all equities against their ancestor.

It appears from the proof in this case that, at the time Robertson filed his petition in bankruptcy, the property in question, but for an apparently fraudulent or collusive agreement between the bankrupt and one McAllister, whereby McAllister's rent, as lessee, of a portion of the property, was reduced from \$300 per month to \$30 per month, should have been yielding a gross income of about \$7,000 per annum; and, with some slight repairs and alterations, changing the premises from a hotel into flats for rental purposes, at an expenditure of between three or four thousand dollars only, the premises are now yielding a gross income of nearly \$7,000 per annum. Aside from the opinion of various witnesses in the record as to the value of the property, the proof as to the income derivable from it shows that this property, at the time of the sale in question, was intrinsically worth a great deal more than the amount of the Green indebtedness, secured by the trust deed to Mr. Peabody. This large margin of value, over and above the secured indebtedness, should have been made available to the creditors of Robertson's estate. They had the right, it seems to me, to be heard, and to determine whether they would pay off the Green indebtedness and take the property, or whether they would elect to have the property sold by the assignee, free and clear of incumbrances, and the incumbrances paid off in their order of priority. In other words, it was not just or equitable towards the other creditors of Robertson, and especially towards the junior lien of complainants, by their judgment, that this large fund available for their payment, or partial payment, should be completely wiped out by this trustee's sale, when there was no one who could interpose for the purpose of protecting the estate.

The evidence in this case shows that Robertson, the bankrupt, immediately after filing his petition, left the United States, and has lived abroad in Scotland ever since that time, and that Taylor and Bruce, the judgment creditors, also reside in Scotland, and that the attorneys, who represented them here, had no actual knowledge of this sale until after they had purchased the property at the assignee's and marshal's sales, as I have heretofore stated. The price paid by Mr. Pratt, as the representative of these judgment creditors, at the assignee's and marshal's sales, showed that these creditors, through their attorneys, were acting in good faith, upon the assumption that

the property was simply in the possession of the trustee for the benefit of Green, the secured creditor, and that he was collecting the rents and applying them upon the interest and principal of the indebtedness, and that whoever purchased the title at this assignee's sale would have the right to redeem from this mortgage.

It therefore seems to me that this bill was filed within a reasonable time, when all the circumstances are considered. The purchasers have been in possession of the property; they have made no such disposition of it as makes it impossible for a court of equity to do substantial justice to all the parties in interest at this time.

A decree will therefore be entered directing an account to be taken of the amount due upon the secured indebtedness by the trust deed, and of the amount expended by David R. Green and those representing his estate in the payment of taxes and for repairs, and of the amount received for rents; and that, upon the payment of the amount so stated and found due, the complainants shall have the right to redeem the premises from said trust deed and have it conveyed to them.

HURST and others v. EVERETT and another.

(Circuit Court, W. D. North Carolina. May Term, 1884.)

1. FEDERAL COURTS—FORCE OF CONSTRUCTIONS OF STATE COURTS UPON POINTS OF LAW.

The federal court, in obedience to the act of congress, conforms as far as possible, in common-law actions, to the forms and modes of practice of the courts of the state in which it may at the time be sitting, and to a certain extent adopts the construction given by the highest court of such state upon its constitution and statutes, and its laws regulating the rights of property.

2. PLEADING—PENDENCY OF FORMER ACTION—RULE UNDER NORTH CAROLINA CODE.

Under the new Code in North Carolina the defense of *pendency of a former action* must be made available by demurrer if the facts relied on appear in the complaint. If they do not so appear, they must be presented by an answer which is in the nature of a plea in abatement.

3. SAME—STATE COURT—UNITED STATES COURT.

The pendency of a suit in a state court does not generally prevent even the same suitor from seeking a remedy in a federal court.

Action at Law.

Johnston & Shuford and J. H. Merrimon, for plaintiffs.

W. B. Ferguson and McLoud & Moore, for defendants.

DICK, J. The defendants, in their answer, allege the facts that the plaintiffs, before the commencement of this action, had begun several actions for the same subject-matter before a justice of the peace of the state, which have been tried and been transferred by appeal to the state superior court, and are now pending for trial. Under the old system of pleading—derived from the common law—which formerly prevailed

in this state, the pendency of a former action was pleaded in abatement to a second action brought by the same parties in regard to the same subject-matter. Under our new Code system such a defense must be made available by demurrer, if the facts relied on appear in the complaint; if they do not so appear, they must be presented by an answer which is in the nature of a plea in abatement at the common law. *Harris v. Johnson*, 65 N. C. 478. The essential features of a plea in abatement must be observed by the pleader, and the defense be brought forward in due form and be insisted on *in limine* before a trial on the merits, or it will be considered by the court as waived. *Hawkins v. Hughes*, 87 N. C. 115. There are some other matters of fact stated in the answer which we will refer to in a subsequent part of this opinion. We will regard that part of the answer which insists upon the pendency of the former actions, as a defense to this action, as a plea in abatement. The demurrer of the plaintiffs admits the truth of the allegations of the plea, for the purpose of determining the legal questions involved.

This question has often been before the state and national courts, and given rise to some real and some apparent conflicts of decision. This long-voxed question has been settled by adjudications of the highest authority, and certain general principles have been announced which now cause uniformity in judicial opinion. I will briefly refer to some of these general principles without any extended citation of authorities, which are now familiar learning.

In the case of *Childs v. Martin*, 69 N. C. 126, the supreme court of this state announced the rule as well settled, and as consonant with reason, and necessary to prevent confusion and conflict of jurisdiction in the administration of justice, "that where there are courts of equal and concurrent jurisdiction, the court possesses the case in which the jurisdiction first attaches." This case was dismissed for the want of jurisdiction. Upon examining the authorities upon this subject it will be found that the rule so broadly stated only applies to courts of the same sovereignty. *Ins. Co. v. Brune*, 96 U. S. 588; *Sloan v. McDowell*, 75 N. C. 29.

The state and national courts were respectively created by separate and distinct sovereignties, and although their jurisdictions are often concurrent, they are in most respects independent, and they cannot generally interfere with the legal proceedings of each other by writ of injunction, or any other restraining, prohibitory, or mandatory writ. In order to secure harmony in the administration of justice, statutes have been passed by congress assimilating the forms and modes of practice, pleading, and procedure of the national courts in common-law actions to those of the courts of the states in which they are held, and requiring them, to a certain extent, to adopt the construction made by the highest courts of a state of the constitution and statutes, and the laws regulating the rights of property in a state. The exclusive and paramount jurisdiction of the national

courts have been clearly defined, and provisions have been made for the removal of certain classes of cases from the state courts to the federal courts, and also for reviewing by the supreme courts the final decisions of the highest courts of the states, where federal questions are involved, by writs of error and appeal.

The courts have also established certain rules, in exercising jurisdiction, founded in comity, wisdom, and experience, and deemed necessary to be strictly observed in order to prevent conflicts, and preserve kindly relations and harmonious action among courts administering justice within the same territorial limits. "In *Payne v. Hook*, 7 Wall. 425, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded, because by the laws of the state the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res* which is the subject-matter of the litigation is entitled to administer it." *Ellis v. Davis*, 109 U. S. 498; S. C. 3 Sup. Ct. Rep. 327.

The principle last announced is sustained by many authorities, and is clearly and fully stated by Mr. Justice MILLER in *Buck v. Colbath*, 3 Wall. 341.

The same principle is also applied when a court of concurrent and independent jurisdiction has, by the nature of its proceedings, first acquired constructive possession or control of property which it must dispose of in affording complete relief. Its decree makes the purchaser's title of such property relate back to the commencement of the suit, and the force and effect of such decree cannot be rendered nugatory by proceedings in a court of another jurisdiction. *Stout v. Lye*, 103 U. S. 66.

This principle was applied by Judge SAWYER in a suit in the circuit court for partition of lands, as he regarded the prior proceeding in the state court as of the nature of a proceeding *in rem*, which gave the court constructive possession or control of the subject-matter in litigation. *Martin v. Baldwin*, 19 FED. REP. 340.

The pendency of a suit in a state court does not generally prevent even the same suitor from seeking a remedy in a federal court, but he can have only one satisfaction, and cannot interfere with property as long as it is under the control of the court of prior jurisdiction, or if it has been finally disposed of by such court in administering relief. As this rule applies in cases where the court of prior jurisdiction has possession or control of property in litigation, and may specifically dispose of the same, there is far less objection to its application in actions upon a *chose in action* where the rights of parties, when ascertained and made definite by judgment, are to be enforced by the ordinary process of execution.

The application of the rule which we are considering is broadly and definitely stated by the supreme court, and sustained by numer-

ous authorities, in *Stanton v. Embrey*, 93 U. S. 548. The operation of this rule is not prevented by the fact that the two actions are respectively pending in a state and national court held in the same district. The federal courts are required to conform their proceedings in civil actions at common law, "as near as may be," to the forms and modes of procedure of the courts of the states in which they are held, and observe certain decisions of the highest courts of such states, but in other respects they are as independent of such state courts as the federal courts of other districts. *Dwight v. Railroad Co.* 9 FED. REP. 785. A non-resident citizen of a state is not bound to seek relief in such state courts, but under the constitution and laws of the United States he has a right to have his case tried in the federal courts of such state, and such courts are bound to afford redress to the extent of their jurisdiction. "They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Hyde v. Stone*, 20 How. 170.

The defendants in their answer state that the several actions brought by the plaintiffs before the justice of the peace have been tried upon the merits, and the plaintiffs have recovered judgments, which they have caused to be duly docketed in the superior court of the state, and thereby have obtained a lien upon the real property of the defendants, and that execution has been stayed by the defendants filing the undertaking required by law for such purpose. The facts thus stated have not been averred with sufficient regularity and precision to amount to a plea in bar, and they appear to have been set forth merely as matter of inducement and explanation of their plea in abatement. These two pleas cannot be properly used at the same time in an answer. In pleadings in common law a *plea in bar* waives a *plea in abatement*, as there is an essential difference between the character and effects of the two species of plea. A plea in bar virtually admits that a cause of action once existed, but insists that the plaintiff cannot now and never can maintain his action for the cause alleged; a plea in abatement seeks to defeat the present proceeding, and does not show that the plaintiff is forever concluded, but it sets out a better form of action for the redress sought. We know of no reason why the rule referred to should not substantially apply to the Code system of pleading. *Woody v. Jordan*, 69 N. C. 189.

The supreme court, in *Stout v. Lye*, *supra*, announces a well-settled rule in pleading: "that where suits between the same parties, in relation to the same subject-matter, are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the other."

I am inclined to the opinion that the judgments referred to in the answer, although rendered on the merits, cannot be used as a bar to further proceedings in this case, as they are not *final* judgments. I will briefly state my views upon this subject, as it was somewhat dis-

cussed in the argument, and I hope that the case will hereafter be tried upon pleadings which will present the merits claimed by the parties.

Under the old system of practice, which once prevailed in this state, an appeal from the judgment of a justice of the peace vacated the judgment, and the appellant was entitled to a trial *de novo* in the superior court. This practice has been changed in some respects by the Code of Civil Procedure. An appeal does not now vacate such a judgment, and the plaintiff, by docketing the same in the superior court, acquires the benefit of a lien on the real property of the defendant situated in the county where docketed. The appellant is entitled to a trial *de novo* in the appellate court, and may stay execution by filing the requisite undertaking. Both of the parties in this case have, in the cases in the state court, availed themselves of the provisions of the Code, and the question of law upon which I will intimate an opinion is whether such judgments can be pleaded in bar of the action in this court. The said judgments are not absolutely vacated, but they are suspended, and have no force or vitality except as a lien on the real property of the defendants. The issues between the parties are to be tried again in the state superior court, and new judgments are to be rendered upon the subject-matter of controversy, which may be decided in favor of defendants. The appeals are not in the nature of a writ of error, which leaves a judgment unaffected, and subject to modification or reversal in the inferior court, in conformity with the opinion of the court of errors, on questions of law; but in these cases the superior court will try the cases on their merits and render its own judgments. No controversy becomes *res adjudicata* and creates an estoppel to another action until it is definitely settled by a *final* judgment; and no judgment is final which does not terminate the litigation between the parties to the action. The appeals in these cases have reopened the controversy, and the judgments are not such as can be pleaded in bar to the case before us.

Let judgment be entered sustaining the demurrer to the plea in abatement, and directing the defendants to answer over, and pay the costs incident to this proceeding.

SOWLES v. UNITED STATES.

(Circuit Court, D. Vermont. August 6, 1884)

IMPERFECT RECORD.

Case will not be heard upon an incomplete transcript of record

At Law.

H. S. Royce, for plaintiff in error.*Kittredge Haskins*, U. S. Atty., and *W. D. Wilson*, for defendant.

WALLACE, J. The transcript of the record brought up on this writ of error consists of a declaration filed by the plaintiff, a consent by the respective attorneys for the plaintiff and defendant to waive a trial by jury, and that the action be tried by the court, and the opinion of the judge of the district court who tried the cause, which concludes with a direction for a judgment for the plaintiff. There seems to have been no plea or answer on the part of the defendant, there is no bill of exceptions, and no formal judgment seems to have been entered.

If it were proper to assume that a judgment had been entered, it would be competent for the plaintiff in error to insist upon any error apparent upon the record, if any exists, and it would then be the duty of the court to inspect the declaration, to ascertain whether the court below had jurisdiction, and whether the declaration sets forth a cause of action, and upon this record only those questions could be considered. *Garland v. Davis*, 4 How. 131; *Bennett v. Butterworth*, 11 How. 669; *Suydam v. Williamson*, 20 How. 427. As the record now is, no such inquiry can be made, and it is ordered that unless within 30 days the plaintiff in error applies for a *certiorari* to bring up a perfect record, or for leave to dismiss the writ of error and proceed anew, (*Elmore v. Grymes*, 1 Pet. 469.) the writ of error shall stand dismissed.

TIMAYENIS and others v. UNION MUTUAL LIFE INS. Co. and another.

(Circuit Court, S. D. New York. August 1, 1884.)

1. LIFE INSURANCE POLICY—INVALID CHANGE OF DESIGNATION.

A person who effects a policy of insurance upon the life of another for the benefit of the latter's wife, which by its terms becomes a paid-up policy after the payment of two annual premiums, cannot, after such premiums have been paid, surrender the policy, without the consent of the beneficiary, by an arrangement with the insurer. In such case, the wife can recover the amount for which the policy is a paid-up one, by the terms of the policy, upon the death of her husband.

2. SAME—PREMIUM—PROMISSORY NOTE.

If a party who effects an insurance upon another's life for the benefit of the latter's wife passes to the insurer his promissory note for the premium, in-

stead of paying the premium in money, the insurer is under no obligation to the beneficiary to enforce the notes against the maker, any more than he would have been to receive them originally instead of the money for the premiums. Accordingly, if, when the notes are paid, the payment, by an arrangement between the parties to the notes, is applied to a different purpose, such payment does not inure to the benefit of the beneficiary in the policy as a payment of the premium.

3. SAME—PROOF OF DEATH—ESTOPPEL.

Where a policy provided for due notice and proof of the death of the insured and of the just claim of the assured, and the insurer had paid the amount of the policy to a party not entitled by law to its benefits, he having presented proofs of the death of the insured to the insurer, and afterwards the rightful beneficiary made proof by affidavit of the death of the insured and the just claim of the assured, a general objection by the insurer to the sufficiency of the proofs is not good.

At Law.

Jefferson Clark, for plaintiff.

Merritt E. Sawyer, for defendant.

WALLACE, J. The plaintiffs are the widow of one Timayenis, now deceased, and her children by him, and they sue to recover the amount due upon a policy of insurance issued by the defendant, April 1, 1869, upon the life of the husband. The defendant is a corporation of Massachusetts, and the policy was issued in that state upon the application of one Rodocanachi, a brother of the widow.

The policy recites an application by Rodocanachi for insurance on the life of Timayenis, and the agreement of Rodocanachi to pay annual premiums for 10 years. It is conditioned to insure the life of Timayenis "for the sole and separate use and benefit of his wife, Fotini Timayenis, and their children, in the amount of \$5,000, * * * payable to the said assured, their executors, administrators, or assigns, ninety days after due notice and proof of the death of the said insured and the claim of the assured." The annual premiums are \$370.25, and the policy provides that after two or more of the annual premiums are paid the policy is to be a paid-up, non-forfeitable one in the sum of \$500 for each premium paid. Rodocanachi was the brother of Mrs. Timayenis, and procured the policy out of regard for her, gratuitously, and in order to secure her a provision in case of her husband's death. She resided in Smyrna at the time, and upon obtaining the policy he wrote to her, inclosing a copy of it, telling her, in substance, that he had insured her husband's life as a resource for her, and that he had kept the original policy in order to collect the proceeds, in case of her husband's death, and use them in his discretion for her benefit. After having made payment of four annual premiums, Rodocanachi surrendered the policy to the defendant, and subsequently obtained from the defendant a paid-up policy for his own benefit on the life of Timayenis, and payable to himself, for the sum of \$2,500. He had made these payments partly in cash and partly by his own notes, which were outstanding at the time he surrendered the policy. This was done without consultation with Mrs. Timayenis, and was not known to her or to either of the plain-

tiffs until after the death of Mr. Timayenis. He died May 29, 1882. Proofs of death were forwarded to the defendant by Rodocanachi, and defendant paid to him the amount due on the new policy.

There is nothing in the case to indicate any bad faith on the part of Rodocanachi or of the defendant. The former supposed he had a right to control the policy, and any fund that might accrue under it, and the defendant acted upon that assumption, and treated him as the insurer, and the party entitled to any insurance which might arise.

Upon these facts it must be held that the defendant entered into a contract with the plaintiffs for insurance upon the life of Timayenis, by the terms of which the defendant, upon the payment of two or more annual payments of premium, became obligated to pay plaintiffs, upon the death of the insured, the sum of \$500 for each annual premium received by defendant. It is quite immaterial that the defendant was induced to enter into this contract by Rodocanachi, the legal effect being the same whether he was the moving party, or whether the insured or the plaintiffs had been instead of him. Neither is it material that the contract would have ceased to be obligatory upon the defendant if Rodocanachi had failed to continue paying the premiums; it suffices that they were paid, and that the defendant received the consideration stipulated for. Upon the receipt of the premiums the obligation of the defendant to the plaintiffs and the right of the plaintiffs to receive \$500 for each premium paid became fastened.

The recitals in the policy show plainly that the defendant did not regard Rodocanachi as an agent of the plaintiffs, or of the insured, to effect the insurance, but as a volunteer who was representing himself only, and who had intervened in the transaction for the benefit of the plaintiffs. The defendant had, consequently, no right to regard him as an agent for the plaintiffs in surrendering the policy and entering into a new contract of insurance. And, in fact, the defendant did not deal with him upon such an assumption, but treated him as the principal, who had a right to surrender the policy because he had advanced the premiums.

The circumstance that Rodocanachi retained the policy, and intended to collect it and apply the proceeds at his discretion, upon the death of the insured, may be laid out of view. The policy was merely the evidence of the contract which had been entered into between the parties—unimpeachable evidence of the terms of the contract, but nothing more. His intention to collect it and control the proceeds cannot alter the legal effect of the contract.

The case is no stronger for the defendant than it would be if Rodocanachi had paid the premiums in advance at the time the policy was issued, and had then refused to pay more. And had this been the case, and had the plaintiffs remained ignorant of the whole transaction until the death of the insured, it is clear they could have sued

upon the policy and recovered the amount paid up. Rodocanachi could not have compelled payment of the amount from the defendant, because the insurance was effected for the use and benefit of the plaintiffs, and the defendant's promise to pay, or obligation to perform, ran to them, and to them only. The plaintiffs could have done so although ignorant of the transaction at the time, because the contract was made for their benefit, and they were named in it as the parties, and the only parties, interested in its performance. *Austin v. Seligman*, 18 FED. REP. 519; *Simson v. Brown*, 68 N. Y. 355; *Hendrick v. Lindsay*, 93 U. S. 143.

Where a policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority to change the designation or title of the money. *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 195; S. C. 6 N. W. Rep. 771; *Pilcher v. N. Y. Ins. Co.* 33 La. Ann. 332. He may be under no obligation to continue to pay the premiums; but if he does, the person originally designated in the policy will derive the benefit, and any change of designation can only be made by his authority. *Bliss, Life Ins.* §§ 339-341, and cases there cited.

By paying the premiums, Rodocanachi advanced the amount to the defendant in trust for the use of the beneficiaries, and the terms of the policy are the conditions of the trust. A gift to a third person for the use of the donee is valid, and can no more be revoked than a gift made directly to the donee. *Wells v. Tucker*, 3 Bin. 366; *Coutant v. Schuyler*, 1 Paige, 316. In the act of disposing of his own the donor can attach such conditions and restrictions as he sees fit, but afterwards his power is gone. When the trust attaches, neither he nor the trustee can exercise any power over the subject-matter, except conformably with the terms of the trust. *Eisp. Eq.* § 67. The beneficiaries not having consented to the substitution of a new fund in place of that created by the original policy, the case stands as to them as if none had ever been made. *Fortescue v. Barnett*, 3 Mylne & K. 36.

The contract was made in Massachusetts and was to be performed there, and is therefore governed by the laws of that state. The statutes of that state declare that a policy expressed to be for the benefit of a married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same, or his creditors. *Gen. St. c. 58, § 62.* It is stated by the court in *Gould v. Emerson*, 99 Mass. 154, 156, to have been the manifest purpose of the statute, among other objects, to restrain the person thus effecting insurance for the benefit of the wife and children of the insured, "from revoking in a moment of caprice or embarrassment the trust which he has once created upon a meritorious, and by the statute a sufficient, consideration." If the case

was not free from doubt upon general principles, it would be clearly so by force of the local law.

The policy provided for due notice and proof of the death of the insured before the termination of the policy and of the just claim of the assured, or the executor, administrator, guardian, or assigns of the assured. Soon after the death of the insured, one of his children notified the defendant of the death of his father, and was informed by the defendant that the claim was settled and paid to Rodocanachi. Shortly thereafter, one of the plaintiffs sent to the defendant an affidavit which stated the death of the insured, and the time and place of his death, and referred to the proof on file with the defendant made by Rodocanachi for further information, and which also stated the facts showing the right of the plaintiffs to claim the insurance. The defendants, in reply, stated they were still waiting for the proofs of death, but did not point out any reason for objecting to the proof furnished. As the proofs of the death of the insured already in possession of the defendant had been accepted by them as satisfactory, there is no merit in the contention of the defendant that the plaintiffs have failed to comply with the terms of the policy in this respect. If the defendant had not already waived any proof of death by claiming that they had paid the loss to the person entitled,—*Norwich Transp. Co. v. Western Mass. Ins. Co.* 6 Blatchf. 241; *Bennett v. Maryland Ins. Co.* 14 Blatchf. 422; *Unthank v. Travelers' Ins. Co.* 4 Biss. 357; *Tayloe v. Merchants' Fire Ins. Co.* 9 How. (U. S.) 390,—they did waive further proof than the affidavit by failing to specify any grounds of objection to it in form or substance. Ang. Ins. §§ 242, 245.

At the time Rodocanachi surrendered the policy to the defendant, the defendant had accepted his note for \$566, in lieu of the money to that extent due from him for annual premiums. These notes were unpaid until after he surrendered the policy. When defendant paid him the loss under the new policy issued to him, the defendant, by an arrangement with him, deducted the amount of the notes from the insurance moneys and satisfied the notes. It would, undoubtedly, have been permissible, between him and the defendant, to have allowed the original policy to lapse. By its terms it would have lapsed upon the non-payment of the notes. He was under no obligation to the plaintiffs to pay these notes, any more than he would have been if he had given them directly to the plaintiffs, (*Pearson v. Pearson*, 7 Johns. 26; *Fink v. Cox*, 18 Johns. 145; *Holliday v. Atkinson*, 5 Barn. & C. 501; *Parish v. Stone*, 14 Pick. 198; *Holley v. Adams*, 16 Vt. 206; *Raymond v. Sellick*, 10 Conn. 485,) because a gift of one's own note is a gift of a promise merely. And as the transaction, so far as the payments were concerned, was exclusively between the defendant and himself, the defendant was under no obligation to plaintiff to enforce the notes against him, any more than it was to receive them originally instead of the money for the premiums. If

Rodocanachi had been acting as the agent of the plaintiffs different considerations would arise. *Dutton v. Willner*, 52 N. Y. 312. When he did pay the notes he did not make payment of them, nor did the defendant accept payment of them, as applicable to the premiums upon the original policy. They were paid, and payment was accepted, in extinguishment of an independent claim existing in his favor against the defendant. So far as the plaintiffs are concerned, the case stands as though they had never been paid. Deducting the amount of the notes, only two annual premiums had been paid upon the policy in suit.

The plaintiffs are therefore entitled to recover \$1,000, with interest, which begins to run 90 days after October 16, 1882, the date of the service of the affidavit of the proof of death and the claim of the plaintiffs upon the defendant.

Judgment is ordered accordingly.

WHITE v. BOYCE.

(Circuit Court, S. D. New York. August 11, 1884.)

1. WRITTEN CONTRACT—PAROL CONTRACT TO MODIFY—ESTOPPEL.

If, according to a written contract, one party was to transfer—upon specified conditions—certain shares of stock to another, who, upon receiving such transfer, was to pay therefor a specific sum of money, the latter party cannot be permitted to show by parol that he was not to acquire an unqualified right to the stock so agreed to be delivered to him, or that he did not assume an absolute obligation to pay for it at the price fixed.

2. SAME—PARTIES—ALLEGED AGENCY—ESTOPPEL.

A party who contracts as a principal will not be permitted to show, in the absence of mistake, fraud, or illegality, that he contracted as an agent in a controversy between himself and the other contracting party, and the knowledge of the other contracting party does not affect the rule.

3. LAW AND EQUITY—COMMON-LAW RULE EMPHASIZED BY JUDICIARY ACT.

Though courts of equity have concurrent jurisdiction with courts of law upon all controversies involving fraud, they will not ordinarily exercise it when the parties have an adequate remedy at law. Section 16 of the judiciary act (Rev. St. § 723) is intended to emphasize the existing rule, and to impress it on the federal courts.

4. SAME—MISREPRESENTATIONS—VALUE OF PROPERTY—ADEQUATE REMEDY AT LAW.

Where the cause of action is for fraudulent misrepresentations affecting the value of property sold, and no relief is claimed except by way of damages, and no discovery is asked, and no complicated accounting is involved, a bill in equity will be dismissed upon the ground that the remedy is at law.

In Equity.

Billings & Cardozo, and *Cowles Morris*, for complainant.

Marsh, Wilson & Wallis, for defendant.

WALLACE, J. The complainant's bill is filed to enjoin the prosecution of a suit at law, pending in this court, brought by the defendant to recover damages against the complainant for the conversion of

5,900 shares of the stock of the Montauk Gas Coal Company. Five thousand four hundred of these shares belonged originally to the complainant, and 500 to the defendant. The complainant had pledged his 5,400 shares to the defendant as collateral security for certain liabilities of his to the defendant, and on July 19, 1880, the defendant transferred them, together with his own 500, to the complainant, to be held by him as trustee, for the purposes of a pool of the stock of the company, until February 1, 1881. After the expiration of the pool period (the stock still remaining in the possession of complainant) defendant demanded its redelivery, and, upon complainant's refusal to comply, brought the suit at law for its conversion. The present controversy does not concern the defendant's right to recover in the suit at law for the conversion of the 500 shares originally owned by him, and delivered to complainant for the purposes of the pool. But the complainant asserts that as to the 5,400 shares there was, at the time of the alleged conversion, nothing owing from complainant to defendant upon a fair accounting of their affairs together, and that he is the equitable owner thereof, although he has never satisfied the specific conditions of the pledge.

The 5,400 shares were pledged by the complainant to the defendant in the course of transactions between them growing out of the formation of the Maryland Union Coal Company, and the sale of the stock of that company; 2,400 shares being pledged about March 3, 1880, and 3,000 shares, September 27, 1880. The defendant was the owner of extensive coal property in Maryland, and engaged in mining coal, and resided at Baltimore; and the complainant was a dealer in coal and in coal stocks, residing at New York. Prior to November, 1879, negotiations took place between the parties in reference to placing the defendant's coal property upon the market. These culminated in the organization of a corporation,—the Maryland Union Coal Company; the transfer of the property by defendant to that corporation, in exchange for 49,995 of the 50,000 shares of the capital stock; and a written contract between complainant and defendant, made November 22, 1879, whereby defendant agreed to hold three-fourths of the stock of the corporation, subject to an option to the complainant to purchase the same. By the terms of the agreement defendant was to transfer to complainant one-quarter of the stock upon the payment by complainant of \$287,500 in three months, another quarter upon a similar payment in five months, and the remaining quarter upon the payment of a similar sum in nine months. Upon complainant's failure to pay for the first quarter, as agreed, the option was to expire. Defendant was to pay \$37,500 of each payment into the treasury of the company for working capital, and when the three-quarters of the stock had been taken and paid for by complainant, defendant was also to pay an additional \$37,500 into the treasury as representing a contribution to the working capital of the corporation upon the quarter of the stock retained by him.

At the expiration of the time for the transfer of the first quarter of the stock the complainant was unable to comply with the terms of the option. The terms were extended by defendant, and on March 3, 1880, a new agreement was made between the parties, reciting that complainant had paid for the first quarter of the stock under the option, and providing for an extension of time for the payment by him for the other two-quarters. At the time this agreement was made, and in order to facilitate the operations of the complainant in selling the stock to third persons, the parties entered into another agreement, by the terms of which defendant agreed to advance \$150,000 to a bank in New York city for the purpose of enabling the bank to make loans on the shares of the company, and complainant agreed to keep \$60,000 of the stock of the Montunk Coal Company in the hands of the defendant as collateral security to protect him against any losses that might arise from the loans that might be made by the bank. Under this agreement the defendant received 2,400 of the 5,400 shares of the gas company now in controversy. September 27, 1880, the complainant wished to obtain 1,000 shares of the coal company stock, which he had agreed to deliver to purchasers. He obtained these shares from the defendant, and as security for \$25,000, the purchase price thereof, made a pledge of 3,000 shares more of the stock of the gas company. This stock was then in the custody of one Bush for the purposes of the pool in the stock of that company before referred to, and the pledge was made in form by Bush.

The facts are undisputed that a loss resulted to the defendant arising from the loans made by the bank out of his moneys, and to secure which the first pledge was made by complainant; and also that defendant has never been paid the \$25,000 for the stock obtained of him by complainant as security for which the last pledge was made by complainant. But the complainant's theory is that, throughout all the transactions between the parties, he was only the agent of the complainant in effecting a sale of his mining property; that the Maryland Union Coal Company was organized, and the two agreements giving complainant an option to purchase its stock were made, for the purpose of putting the stock upon the market, and to enable the complainant to obtain subscriptions and sell the stock to others as the agent of the defendant and for his benefit; that, in fact, it was agreed between the parties that complainant should receive for his services in the matter all proceeds of the sale of the stock above the sum of \$22 per share; that the defendant had represented to him that the coal lands contained at least 350 acres of big-vein coal, which fact, if true, would have made the property extremely valuable; that, relying upon this agreement and the representations by defendant as to the big-vein coal, he had, in fact, placed 18,400 shares of the stock with third parties, who had agreed to purchase the same at the price of \$30 per share; that after he had sold part of

the stock, and before the remainder had been delivered to or paid for by the persons who had agreed to take the same, it was discovered that the defendant's representation as to the big-vein coal were untrue, and the complainant was unable to induce those who had agreed to purchase the stock to carry out their agreements, and in consequence thereof he sustained a loss in a sum more than sufficient to satisfy any claims of the defendant upon the stock of the gas company pledged to him; and that by reason of the premises he is entitled to recover \$142,000 of the defendant as damages upon a fair accounting.

The proofs undoubtedly authorize the conclusion that the coal company was organized for the purpose of enabling defendant to dispose of his coal property by exchanging it for the stock of the corporation and selling the stock, and that the option for the purchase of the stock given to complainant by the contracts of November 22, 1879, and March 3, 1880, was given in order to carry out that object, and enable defendant to dispose of three-quarters of his interest in the property. It is also apparent that the defendant understood that complainant intended to place the stock with subscribers, or sell it to purchasers, and thereby obtain the means of carrying out his option contract. Whether, in carrying out this plan to effect a sale of the defendant's property, it was the intention of the parties that the relation of principal and agent should exist between themselves, or whether it was intended that the complainant should occupy the position of a speculator on his own account, instead of a fiduciary, are questions as to which there is much conflicting testimony. Concededly, if there was any agreement between the parties other than that expressed in the written contracts between them, it was made prior to or contemporaneously with the written contracts. However the fact may have been, no inquiry into the preliminary or contemporaneous negotiations of the parties is competent for the purpose of showing that they were dealing together as principal and agent, because extrinsic evidence to this effect would contradict or vary the legal import of the written contracts. By these contracts the defendant agreed to transfer certain shares of stock to the complainant, upon specified conditions, and the complainant agreed, upon receiving such transfer, to pay therefor to the defendant a specific sum of money. The complainant cannot now be permitted to show by parol that he was not to acquire an unqualified right to the stock which was to be delivered to him, or that he did not assume an absolute obligation to pay for it, when delivered, at the price fixed; and such would be the result if he should be allowed to prove that he was to sell the stock to third persons as an agent for defendant, and was to account to him at the rate of \$22 per share. He who contracts as a principal will not be permitted to show, in the absence of mistake, fraud, or illegality, that he contracted as an agent, in a controversy between himself and the other contracting party. Whart. Ag. §§ 410,

492. And the knowledge of the other contracting party of his real character does not affect the rule. Taylor, Ev. § 1054. The case is not like those where a part only of a verbal contract has been reduced to writing, (*Potter v. Hopkins*, 25 Wend. 417; *Batterman v. Pierce*, 3 Hill, 171; *Grierson v. Mason*, 60 N. Y. 394,) or where an agreement collateral to the written agreement is set up, (*Lindley v. Lacey*, 17 C. B. (N.S.) 578; *Chapin v. Dobson*, 78 N. Y. 74; *Crossman v. Fuller*, 17 Pick. 171,) which does not interfere with the terms of the written contract, though it may relate to the same subject-matter. The written contract here is of the very essence of the transaction between the parties, and creates the relation of vendor and purchaser between them. It fixes their mutual rights and obligations, and cannot be subverted by extrinsic evidence. As is stated by DENIO, J., in *Barry v. Ransom*, 12 N. Y. 464, "the legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence as its language."

It is not claimed that there was any subsequent modification or change in the relations of the parties. The complainant's right to relief must therefore rest upon the theory that his vendor misrepresented to him material facts affecting the value of the stock purchased. If it should be assumed that his allegations in this regard are established by the proofs, he must fail, because his case does not entitle him to any equitable relief. No facts are alleged in the bill as a foundation for an equitable set-off; no discovery is asked; and no facts exist which tend to show that the complainant has not a plain, adequate, and complete remedy at law to recover such damages as he may have sustained. While courts of equity have concurrent jurisdiction in all cases of fraud, they will not ordinarily exercise it, if there is a full and adequate remedy at law, (*Bisp. Eq. § 200; Ambler v. Choteau*, 107 U. S. 586; S. C. 1 Sup. Ct. Rep. 556,) and the federal courts are especially admonished not to entertain such cases. The statutory enactment, (section 16 of the judiciary act, Rev. St. § 723,) if only declaratory of the pre-existing law, is at least intended to emphasize the rule and impress it upon the attention of the court. *New York Co. v. Memphis Water Co.* 107 U. S. 205; S. C. 2 Sup. Ct. Rep. 279. It is the duty of the court to enforce this rule *sua sponte*. *Oelrichs v. Spain*, 15 Wall. 211; *Sullivan v. Portland R. Co.* 94 U. S. 806. It would therefore not be proper to assume to determine the question of fact whether any misrepresentations were made to complainant by defendant.

Jurisdiction properly assumed, upon one aspect of the controversy, would authorize the court to proceed to a decree which would do full justice in the case upon all its branches. But unfounded claims of a character cognizable in equity cannot be made the basis of relief respecting other controversies between the parties which are cognizable only at common law.

The bill is dismissed, with costs.

WIRT v. McENERY.

(Circuit Court, N. D. Illinois. May, 1884.)

1. **PROPERTY IN A STREET-BED—DEDICATION—POWER OF ATTORNEY—ESTOPPEL.**
A power of attorney to sell and convey does not imply authority to the attorney to dedicate or give any part of the principal's property to the public; but, when the power is expressly to dedicate, the owner is estopped to deny the act of his agent.
2. **SAME—VACATION BY CITY—WAIVER OF RESERVED RIGHTS.**
In the event of a street, previously dedicated to the city of Chicago, being vacated by an ordinance of the common council, such vacation to continue so long, and so long only, as the ground shall be used for railroad purposes, a subsequent resolution, declaring the vacation absolute, is sufficient to operate as a waiver by the city of its reserved rights in the premises, notwithstanding the fact that the latter resolution was passed by a majority rather than two-thirds of the aldermen elected.
3. **SAME—CONDITIONAL VACATING—EFFECT.**
When the city of Chicago assumes to vacate, even conditionally, a street previously dedicated to it, it loses all title with which it was vested by the act of platting.
4. **SAME—TITLE—ABUTTING LOT-OWNER—REVERSION.**
By the vacating by the city of Chicago of a street previously dedicated to it, the title to the ground does not pass to the abutting lot-owner, but to the original owner of the land.

At Law.

S. C. Judd and William Ritchie, for plaintiff.

J. P. & T. R. Wilson, for defendants.

BLODGETT, J. This is an action of ejectment for the recovery of a strip of land in block 67, school-section addition to Chicago. The material facts essential to the disposition of the case, as I view them, are briefly these: In June, 1853, James Depuyster Ogden was the owner in fee of block 67, in school-section addition to this city. In May, 1852, he gave to William B. Ogden a power of attorney, authorizing him to sell and convey the block in question, and also to plat and subdivide the same in such manner as he should deem best to make it marketable, and to acknowledge and record any plat which he should so make, in conformity with the laws of the state. Acting under this power of attorney, Mr. Ogden, in the forepart of the month of June, caused this block to be surveyed, and laid out and subdivided into lots and streets; and on the sixteenth of June, 1853, the plat was duly acknowledged by Mr. William B. Ogden, as the attorney in fact of James Depuyster Ogden, and recorded in the office of the recorder of Cook county. Upon this plat was a street 60 feet wide, called Depuyster street. The plat and acknowledgment seem to be in all respects in conformity with the provisions of the statute, except that the subdivision is made and the plat acknowledged by the attorney in fact of the owner of the fee, rather than by the owner of the fee in his own person. On the twenty-eighth of July, 1862, the common council of the city of Chicago passed an ordinance vacating Depuyster street,

except a strip 20 feet wide in the center thereof, and this suit is brought by the plaintiff, as grantee of the heirs at law of James Depuyster Ogden, to recover from defendants the south 20 feet of said Depuyster street.

The defendants deny plaintiff's right to recover, (1) on the ground that the subdivision made in 1853 was not in accordance with the Illinois statute, because the plat was acknowledged by the agent and attorney in fact of the owner of the fee, and not by the owner himself in person; (2) that the ordinance vacating the north and south 20 feet of the street was conditional, and to be operative only so long as certain adjacent property was used for railroad purposes, and reserved the right of the city to enter upon the portions of the street so vacated for the purpose of laying down or repairing sewers or water-pipes.

In support of the first position defendants' counsel relies upon the case of *Gosselin v. City of Chicago*, 103 Ill. 623, where it was held that as the statutes of Illinois stood at the time this subdivision was made, and the plot thereof acknowledged and recorded, it was necessary that the plat should be acknowledged by the owner of the fee in person, and that it could not be done by an attorney in fact. I have examined this case carefully, and also an abstract introduced on this trial of the evidence in that case, and find that the power of attorney under which the subdivision was made in the *Gosselin Case* was only an ordinary power to sell and convey, while the power of attorney to Mr. W. B. Ogden, under which the subdivision and plat now in question were made, in express terms authorizes the attorney to make the subdivision and acknowledge and record the plat pursuant to the laws of this state; and this fact seems to me to sufficiently distinguish this case from the *Gosselin Case*. Here the owner of the fee contemplated a subdivision of his property into lots and streets under the law of Illinois, and clothed his attorney with authority to do so; and it seems to me there can be no valid reason assigned why it was not in the power of such owner to so act by an agent under the statutes of this state. It may be urged with some force, under the facts in the *Gosselin Case*, that a power of attorney to sell and convey does not imply authority to the attorney to dedicate or give any part of the principal's property to the public; but in so clear a case as this of an intention to so dedicate, I think the owner must be estopped to deny the act of his agent.

As to the second point raised, it appears without dispute that the common council of this city, on the twenty-eighth of July, 1862, passed an ordinance, the title and first section of which read as follows:

"An ordinance to vacate De Puyster street. Be it ordained, etc.

"Section 1. That the street running east and west through block 67, school-section addition to Chicago, known as De Puyster street, except a strip of the same through the center thereof twenty feet in width, running from Canal

street east, a distance of one hundred and twenty feet, be and the same is hereby vacated and discontinued: provided, however, that such vacation and discontinuance shall continue so long, and so long only, as the same may be used for railroad purposes. And it is further provided, that the authorities of said city shall at all times have and possess, without charge or hindrance, the right to enter upon that portion of said street hereby vacated, or any part thereof, for the purpose of laying down or repairing either sewerage or water pipes."

And in December, 1882, the common council by resolution declared the portion of the street so vacated by the ordinance of 1862 to be absolutely vacated. I can give no other construction to this resolution than that it is a release of the reserved right to reopen the street to full width, in case the adjoining property should cease to be used for railroad purposes, and the right to enter upon the vacated portions of the street for the purpose of repairing or laying down sewer or water pipes. It is true, it was not passed by a two-thirds vote of all the aldermen elected, but it was passed by a majority; and it seems to me the two-thirds vote was not needed to release or waive this reserved right. In other words, it does not seem to me to require a two-thirds vote of the common council to waive any rights the city reserved as to this street.

I therefore conclude that by the operation of the ordinance and resolution there is an absolute vacation of all the street except a strip 20 feet wide in the center.

But if I am wrong in regard to the effect to be given to the resolution, I still think that under the ordinance the portions of the street vacated were so far vacated as to amount to an abandonment of the statutory dedication made by the owner. The owner of the property dedicated it in conformity with the statute to the public for a street, and the statute operated upon such dedication to pass the fee to the city of Chicago. When the city abandoned this dedication to public use, or if it had refused to accept it, the title, it seems to me, reverted to the original owner. I doubt if the city can make a partial vacation of a street which shall operate as an abandonment of the property for the public use which the owner of the fee in laying it out intended, and yet retain the fee; but I think that, on the contrary, when the city assumed to vacate this street, even conditionally, it lost all title with which it had been vested by the act of platting.

In *Canal Trustees v. Havens*, 11 Ill. 554, it was held that when the owner of land subdivides the same into blocks, lots, streets, alleys, etc., the fee of the streets passes to the municipality; and in *Hyde Park v. Borden*, 94 Ill. 26, it was held that on the vacation of a street or alley, where the fee had passed to the corporation by the making and recording of a plat, the fee reverted to the original owner, who had dedicated it to the public, and not to the abutting owner.

The facts in this case seem to me to bring it clearly within these two cases. By making, acknowledging, and recording the plat, the fee passed to the city of Chicago; by the vacation of the street, the fee

reverted to the heirs of the original owner. They have conveyed the fee to the plaintiff and he is clothed with all their rights.

But it is further urged, in the light of the authority of many cases outside of this state, that on the vacation of this street the title passed to the defendants, who were the owners of the abutting lot. I think it is sufficient to say, in answer to this position, that since the decision of *Canal Trustees v. Havens* the rule in that case and that in *Hyde Park v. Borden* have become a rule of property in this state. It must be admitted that under nearly similar statutes to that of Illinois, the courts of other states have held that on the vacation of a street or highway the title goes to the abutting owner; but there can be no doubt that a different rule prevails in this state, and I think it has been so long asserted that it has become a rule of property, and therefore this case should be determined in accordance with the decisions of the courts of this state.

The defendants are therefore found guilty, as charged in the declaration, and the fee of the 20-foot strip immediately west of and adjoining lot 16, block 67, school-section addition, (the property in controversy,) is found to be in the plaintiff.

UNITED STATES v. BANK OF MONTREAL.

(Circuit Court, N. D. Illinois. July 21, 1884.)

1. REVENUE LAWS—BRANCH OF FOREIGN BANK IN UNITED STATES—TAXES—REV. ST. § 3407.

A bank in Canada, which has established a branch in Chicago, must be held to carry on a banking business, within the definition of Rev. St. § 3407, it having a place of business where credits were opened by the deposit of money, subject to be paid or remitted upon draft, check, or order, and where bills of exchange were issued and sold.

2. SAME—REV. ST. § 3408.

The meaning and intent of the whole of section 3408, Rev. St., was to assume that the active moneys employed by an incorporated bank were represented by its capital, and that the capital of a branch bank was the amount which was allotted to it, or which it was permitted to use, and the branch, for the purpose of this tax on capital, was deemed a separate entity.

3. SAME.

As the Bank of Montreal can have no corporate existence in the United States, but only transacts business by comity, an agency established by it here must, for the purpose of the revenue laws, be considered the same as a private person engaged in the banking business, and pay the tax upon the amount of money employed in its business, without regard to whether it is, technically, capital or not.

Action to Recover Internal Revenue Tax.

Richard H. Tuthill, for complainant.

Boutell, Waterman & Boutell, for defendant.

BLODGETT, J. This is a suit to recover internal revenue taxes

claimed to be due from defendant on the capital employed by defendant in the business of banking from the first of November, 1871, to the first of December, 1879. The defendant is a corporation created and existing under the laws of the dominion of Canada, having its principal place of business in the city of Montreal. Its chartered capital is \$12,000,000, fully paid up, and it has a reserved fund of \$5,000,000, and average deposits of about \$17,000,000. On the first of November, 1871, it established a branch or agency in the city of Chicago, which has been continued to the present time. At the time this branch or agency was established here, its manager was informed that the sum of \$100,000 had been assigned to his agency as capital. The business here has been the receiving of deposits to be paid out on draft or check of the depositors, buying and selling of domestic and foreign exchange, and the loaning of money on warehouse receipts for grain and provisions as collateral security,—the deposits averaging about \$2,000,000 per month, and the profits on the business transacted here amounting to about \$10,000,000. The \$100,000 assigned as capital has been treated and known upon the books of the agency as "fixed capital," and the internal revenue regularly paid thereon. In June, 1881, an examination was had by F. J. Kinney, agent of the internal revenue bureau, of the books and accounts of the agency, from which it was ascertained that a much larger amount of money had been used in the business of this agency than the \$100,000 capital allotted to it, and he reported the amount due for tax on capital, under the second paragraph of section 3408 of the Revised Statutes, which imposed a tax of one twenty-fourth of 1 per cent. per month upon the capital employed in banking, to be \$83,775.56. After this report was received, an assessment was made and warrant issued for the collection of the portion of said tax which had accrued within two years, amounting to \$24,543.88, and the amount of this assessment paid under protest. This suit is now brought to recover the balance of \$59,229.68 of the tax so ascertained to be due, or reported to be due, by the examiner Kinney, and which it is claimed accrued between the establishment of the bank, December 1, 1871, and December 1, 1879. Several defenses to the right to recover this money are interposed: (1) That this Chicago agency is a branch of the parent bank in Montreal, and as such only liable to pay internal revenue taxes on the capital allotted to it by the parent bank, under the last clause of the third paragraph of section 3408; (2) that the funds used and loaned here cannot be considered capital of this bank, as they are sent here for temporary use, and liable to be withdrawn for use elsewhere at the will of the home management; (3) that the funds used here are not a part of the capital of the parent bank, but are part of its surplus funds, made up in part, at least, of the profits of this agency or branch; (4) that most of the funds by this branch are not employed in the business of banking, as defined in section 3407, Rev. St.

The assistant manager of this branch or agency, who was called as a witness on the trial, explained the course of business by saying, "When we see a chance to loan money here to good advantage, we notify the home office at Montreal, and they send it to us if they have it;" and his testimony shows that the average amount of money used for the first five months after this branch was established was over \$400,000 per month; and from the time the agency was established there was a steady increase in the business, so that the amount of money employed in the business for the 12 months ending the thirty-first of May, 1879, was \$1,496,635 per month. It will thus be seen that a large sum of money belonging to the parent bank was constantly employed in its business here. Whether the profits made in the business here were retained and used here, or whether those profits were remitted to Montreal as fast as made, and the money to be used here was sent from Montreal as wanted, does not seem to be material.

Section 3407 defines a bank and banker as follows:

Sec. 3407. "Every incorporated or other bank, and every person, firm, or company, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank, or as a banker."

Certainly, the business carried on by the defendant here must be held to be a banking business within this definition. It had a "place of business" where credits were opened by the deposit of money, subject to be paid or remitted upon draft, check, or order, and where bills of exchange were issued and sold. The last clause of the third paragraph of section 3408 reads as follows:

"In the case of banks with branches, the tax herein provided shall be assessed upon the circulation of each branch severally, and the amount of capital of each branch shall be considered to be the amount allotted to it."

It is contended that the defendant is a bank with branches, within the meaning of the provision, and that only the sum of \$100,000 capital was allotted to this branch by the parent bank. At the time the internal revenue system was adopted, in 1861, there were no national or United States banks, but in several of the states there existed what were called state banks, with power to establish branches. As I now recall the facts from memory, such banks existed in Ohio, Indiana, Missouri, and Iowa; and in the charters of these state banks there was a provision for establishing branches, and allotting or determining the amount of the capital of such branches; and I am of opinion that this provision as to the taxation of branch banks had special reference to the then-existing state banks and their branches, although the language used is comprehensive enough to apply to any future institutions of the same character, whether state or national. The evident meaning and intent of the whole section 3408 was to assume

that the active moneys employed by an incorporated bank was represented by its capital, and that the capital of a branch bank was the amount which was allotted to it, or which it was permitted to use, and the branch for the purpose of this tax on capital was deemed a separate entity. Ordinarily, what is known as the capital of a bank is the fund paid in by its shareholders on their capital stock, and this forms the basis upon which the business of the bank is conducted. The banks loan this money, or use it in the discount of commercial paper, in the purchase and sale of exchange, or, in the cases of banks of circulation, for the purpose of redeeming or securing their current notes; the profits of the business are, as a rule, after payment of expenses, distributed as dividends to shareholders. If, for any reason, all or part of the profits are retained by the bank, such retention may be only temporary, and are liable to be paid out in dividends at any time. So, as a basis of this internal revenue tax, the paid-up capital, as a fixed fund, was taken,—assuming that, as a rule, the capital represented the moneys which the bank used in its business. In this case, however, we have a foreign bank with the control of a very large amount of money establishing an agency here for the loaning of its money. It conducts through such agency all the business of a bank: receives deposits, buys and sells exchange, discounts notes and bills, and loans money. As the bank of Montreal can have no corporate existence here, but only transacts business by comity, this agency must, I think, for the purpose of this law, be considered the same as a private person engaged in the banking business, and pay the tax upon the amount of money it employs in its business, without regard to whether it is technically capital—that is, the fund contributed by its stockholders—or not. It sends its money here to be used in banking business, taking, perhaps, only that which it has accumulated from its home business and not been divided, or leaving here the profits realized from the business here. If the defendant has power under its charter to establish branches, that power would only authorize the establishment of branches within the jurisdiction of the sovereignty which created the corporation; that is, it cannot establish a branch with its corporate powers here, but the business it transacts here is more in the nature of an agency than that of a branch. And if any of the funds of the home corporation are sent here and used here in conducting a banking business, they should, in my opinion, pay the tax imposed under the second paragraph of section 3408, as capital employed by a person in the business of banking. It could not have been the intention of congress to allow banks of foreign countries to send their money here, to be loaned and used by an agent for the profit and benefit of such banks, without subjecting them to the same burdens imposed by the law on domestic banks and bankers.

It is further urged that the money used here by the defendant was not its capital, but was part of its surplus or reserve, and the decision of Mr. Justice NELSON in *Mechanics' & Farmers' Bank v. Townsend*, 5

Blatchf. 315, is cited in support of this position. It may be sufficient, to distinguish this case from the one at bar, to say that the question then under consideration was the meaning of the word "capital," as used in paragraph 1 of section 79 of the internal revenue act of June 30, 1864, and had application to the amount to be paid for license to do business as a bank or bankers; but it does not seem to me the rule given in that case is at all applicable to an agency like this of a foreign bank. If this defendant, being incorporated as a bank in a foreign country, had transacted all its business here, then its capital paid in, and forming the basis of its business, might be properly held to be the measure of its liability for this tax; but when such a corporation uses its surplus or reserve fund in conducting a banking business in this country, its capital, for the purposes of this tax, must, I think, be the amount of money it uses from month to month in the business here. It is said this surplus was only temporarily used here, but the proof shows how much was used each month, and the statute imposes a tax of one twenty-fourth of 1 per cent. per month on the money so used. If at the end of a month it had been withdrawn, and returned to the defendant in Montreal, all further liability would be at an end.

It is further urged that the business transacted by the defendant here was not a banking business, as defined by section 3407, because the money was not advanced or loaned on stocks, bonds, bullion, etc., but was loaned on the pledge or warehouse receipts for grain and provisions. The assistant manager for defendant says, in his testimony: "When we lent money we took a note and the warehouse receipts as collateral; we rely wholly on these collaterals."

Section 3407 declares, in effect, that every incorporated bank, and any firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced on bullion or stocks, bonds, etc., shall be regarded as a bank or banker. This defendant had a place of business here where credits were opened and deposits received and paid out on checks, so that it comes within one of the definitions of a bank or banker, and, being such, it is liable to pay the tax in question, without regard to what security it took for money loaned or advanced. So, also, a person or firm who advanced or loaned money on stocks, bonds, etc., is a banker; but when a banker—that is, one who comes within either of the definitions—loans money on other security than stock or bonds, that does not relieve him from this tax liability as to such business. Many banks, especially in the older eastern states, only loan money on notes secured by the name of an approved indorser or surety; but, if they are banks, it makes no difference what security they take for their loans, they are still liable to this tax.

I therefore conclude that the defendant is liable for the amount of tax claimed in this case,—\$59,229.68,—with interest at 6 per cent.

from the time when such tax accrued. No computation of this interest was made at the time of the trial, but it may be made and submitted.

The proof also shows that the defendant paid \$9,629.92 for taxes on clearing-house checks, on which it has been refunded \$2,573.91, leaving a balance yet due of \$7,056.01. As I understand the proof, after this tax had been paid several years the commissioner ruled that the banks were not liable to pay on these checks, and refunded what had accrued within two years, but refused to go further back, leaving this balance of \$7,056.01 unpaid, and defendant now insists that this amount should be set off against the taxes now found due. This is an equitable action, and the inquiry really is how much is justly due the plaintiff; and I think it is conscionable and right to deduct this sum of overpaid tax on clearing-house checks from the tax on capital, as this claim and counter-claim accrued contemporaneously and out of the same business.

SHENFIELD v. SCHIRMER and others.

(Circuit Court, S. D. New York. August 7, 1884.)

PATENT—SUSPENDER ENDS.

The suspender ends made conformably to Schirmer's patent of June 27, 1876, do not infringe the patent of Shenfield.

In Equity.

F. C. Reed, for complainant.

Wetmore & Jenner, for defendants.

WALLACE, J. The suspender ends made by the defendants conformably to their patent of June 27, 1876, are not an infringement of the complainant's patent.

The suspender ends of the complainant's patent are described as made of a double flattened cord or strip bent around into a loop or united together, leaving sufficient of the loop open to form the button-hole, and united to a buckle or clasp by the attaching pieces, *d.* The cord or strip is composed of woven, braided, knitted, or crocheted threads of suitable fibrous material, laid up into the form of a complete flat cord or strip, and when the cord or strip is folded to form the button-hole loop, the seam above the loop may be made by sewing, knitting, crocheting, or otherwise; or the knitting or crocheting is commenced at the line where the strips meet and extended at both sides thereof and around the button-hole by the successive ranges of interlocked loops.

The claim is, "the suspender end made of a flat cord or strip of fibrous material bent into a loop laid flatwise, united at the inner edges, and connected to the attaching pieces as set forth."

The latter part of the description relates to the manner of securing the edges of the fabric by re-enforcing or covering them around the button-hole by crocheting or knitting, and is of no materiality for present purposes. There was no novelty in the attaching pieces.

Button-straps for suspenders, made of woven material, were old; flat suspender ends of various materials, with a button-hole cut in them, were old; and suspender ends made of a round cord, with the ends turned back and fastened to form a loop, were old. The complainant's invention was apparently suggested by the latter description of suspender ends, and was designed to remedy the objection against the round cord, which is stated in the description to be "that it does not lie flat against the person or beneath the button." What he did was to substitute a flat cord or strip for the round cords previously used, which may have been an invention, but was an invention of a very narrow kind.

In view of the prior state of the art, and the language of the description and claim of the patent, the complainant's patent is to be construed as one for a suspender end made of a flat cord or strip, bent to form a button-hole, and the ends turned back and united at their inner edges, and connected to attaching pieces.

The defendants' suspender ends are made of flat braid, with a button-hole formed in them, in the process of plaiting the braid. The patent-office regarded them as a different invention from the complainant's, and issued a patent to the defendants upon that theory.

I do not think there was any patentable novelty in leaving a hole in the strap or braid in the process of weaving, plaiting, or crocheting the material, (the crocheted towel-loop described in Harper's *Bazar* shows this,) but I agree with Mr. Brevoort, the defendants' expert, that a suspender end made in this way is not the suspender end of the complainant's patent. The complainant's article may be made by the use of machine-made braid or cord, while the defendants must be made by hand. The complainant's article can therefore be made more conveniently and at less cost; and this, as the complainant states in his affidavit in the interference proceeding, is the reason why he adopted the mode of making his end which he described in his patent. It would seem that this advantage is really the chief merit of the invention, as flat suspender ends were old. The defendants' braid is not united at its inner edges, and is not a double cord or braid like the complainant's.

The bill is dismissed.

WEIR v. MORDEN.

(Circuit Court, N. D. Illinois. August 4, 1884.)

PATENT—IMPROVEMENT IN RAILROAD FROGS.

The second claim of reissue patent No. 8,914 requires the point of the "frog" to be constructed as directed in the body of the patent. The U iron, as a mode of connecting the point and wing rails, was in public use and well known before the complainant claims to have been the inventor thereof.

In Equity.

Wood & Boyd and Banning & Banning, for complainants.

Offield & Towle and H. Harrison, for defendants.

BLODGETT, J. The complainant in this case seeks to restrain the infringement of reissue patent No. 8,914, issued to complainant, September 30, 1879, for "an improvement in railroad frogs," the original patent, No. 215,248, having been dated May 20, 1879. In his specifications complainant describes the mode of constructing his frog to consist in a peculiar mode of combining the rails so as to form the V-shaped point or angle of the frog, and also in connecting the point and the wing rails with channel iron, the upturned sides of which are bolted to the wing rails and the point rails.

The defendant is charged with infringing only the second claim of the patent, which is as follows:

"(2) A frog composed substantially of two center rails, B, B¹, joined to form the V-shaped point, united to outside diverging or wing rails by means of two channel or U irons, D, D, one wing of which channel or U irons is shaped to fit the web of the abutting rails, combined to form the point of the frog, and upon the other side fitting the web of the wing or diverging rail respectively, and secured by bolts or rivets passing through the webs of the rails and the sides of the channel bars, substantially as shown."

The history of this patent, as gathered from the records in this case, seems to be this: In October, 1877, the complainant filed the application for his patent, and on December 2, 1877, the patent was allowed with certain claims; but, as he now insists, by the neglect of his solicitor, the final fee to the patent-office was not paid, and the proceedings to obtain the patent lapsed. Sometime in February, 1879, he renewed his application, and asked that the original specifications and drawings might be considered as part of the renewed application, and the original patent, No. 215,548, was issued May 20, 1879. On June 29, 1879, application was made for a reissue, which resulted in the reissue No. 8,914, now before the court.

Testimony has been put into the record by the complainant, as a witness in his own behalf, tending to show that he made the invention in question previous to June, 1876; but he is unable to define the time with any degree of certainty, except that on June 10, 1876, he exhibited a rough sketch or diagram of his proposed device to Mr. W. H. H. Allison, who affixed his name to said sketch at that date,

and who has testified to doing so, and the sketch is produced in evidence.

The defenses interposed are (1) that defendant does not infringe; (2) that the second claim of the reissue is void because it was not warranted by the original specifications nor the models; (3) that the device now claimed to be covered by the second claim of the reissued patent had been in public use more than two years before the complainant made his application for a patent.

The question of fact as to infringement depends upon whether the "two center rails, B, B¹, joined together to form the V-shaped point" mentioned in the second claim, necessarily mean the two center rails which are described in the specifications, or does it mean any center rails joined together in any manner to form a V-shaped point? The answer to this question seems to me to be found in the complainant's own specifications. He says:

"My invention consists—*First*, in such a formation and connection of the two rails which make up the angular point as that one of the rails extends unbroken and uncut across the path of the other, and in itself makes a solid end to the point, with a full length of flange, which is overlapped by the flange of the other rail, and thus the flange of double thickness is afforded at a point where strength is particularly needed, and the cutting away of the flanges, as is usually the custom, is avoided entirely."

In his description of the drawings he says:

"A, A¹, are the outer or wing rails of the frog, and B, B¹, are the two rails which compose the acute angle or point."

And in his description of the mode of constructing his device he says:

"In place of cutting away both the flanges between the two rails midway between the lines of the angle of the frog, as is common now, and, I may say, usually practiced, I continue the flange of the rail, B, of full width, intact, clear along the junction of the two rails to the point where it strikes the flange of the outer rail, as shown in figure 3, which is almost immediately under the point, X¹, of the frog, and I swage up the flange, B¹, of the rail, B¹, on one side, as shown in figures 5 and 3, so that it lies over the flange of rail, B; this flange of rail, B¹, being cut away angularly on the edge to properly meet the line of the web, B², of the rail, B."

It will thus be seen that minute directions are given as to the construction of the two center rails, B, and B¹, to form a V-shaped point, and I am of opinion that the two center rails, B, and B¹, described in the second claim, are the rails constructed and joined according to the description given in the patent. The language of the claim is, "The two center rails, B, B¹, join to form the V-shaped point," not any two center rails joined to form a V-shaped point. The V-shaped point made by extending one rail unbroken and uncut directly across the path of the other, and thereby making a solid end to the point, and with the flange of the rail, B¹, swaged up so as to lie upon or overlap the flange of the rail, B, seems to me to be an essential element of what complainant supposed he had invented, and therefore

the two center rails, B, B¹, mentioned in the second claim, refer to and mean the two center rails which he has particularly described in his specifications. The proof in the case wholly fails to show that the defendant forms the V-shaped point, in his frog, in the manner that complainant forms his point; indeed, the fact seems to be admitted that defendant does not form his points in the same manner described by complainant's specifications, and I understand the learned counsel for complainant to concede upon the hearing that, unless the second claim is held to include any V-shaped point joined to the wing rails by U irons, there is no infringement made out in this case. But, if I am wrong in my construction of this claim, the proof is conclusive that as early as September 13, 1876, railroad frogs, in which the point and wing rails were connected by channel irons or plates substantially as now constructed by the defendant were kept for sale and sold and put in public use on several railroads in this state; and the court will presume that in the due course of business it took at least some months before that time to devise and produce these frogs. The frogs thus sold were manufactured by the defendant, as he claimed, under patent No. 148,264, dated March 3, 1874, issued to George Thomas and William Miller, of which he, defendant, was owner, and under patent No. 173,804, dated February 22, 1876, issued to the defendant himself as the inventor. The Thomas and Miller patent shows a brace-plate which is but a narrow channel iron, the turned up edges of which were bolted to the wing rails, so as to stiffen the rails and keep them at their proper distance apart, while the Morden patent, of February 22, 1876, showed the wing rails or frogs connected by a U iron, or "trough-plate," as he calls it, the upturned sides of which "are made to conform to the curve of the side rails, as well as to the form of the neck and base of the rail, and are firmly secured to the neck of the rail by bolts or rivets." But instead of holding the V-shaped point in place by the use of channel iron or brace-plates, he provided a V-shaped recess in the channel, or trough-plate, into which the point of the frog was inserted and held; but the proof shows, in applying his device to crossings instead of switches, he used channel or V-shaped irons to connect the points and the wing rails, and the connection of his peculiar form of V-shaped point with the wing rails by means of the U irons, bolted or riveted to the web of the point and wing rails, is an element of complainant's device now in controversy. But, after Thomas and Miller had shown the use of their brace-plate, which, as I have said, is but a short channel iron, and after Morden had in February, 1876, showed the use of the V-shaped plate as a means of connecting the two outer rails, there would seem to be little room for invention, and it was only a mechanical application of the same device to apply the channel iron to hold the V-point in its proper place, instead of the recess which Morden adopted. In other words, when once the utility of the channel iron as a means for holding the wing

rails in their proper relations to each other was shown, there was no more invention in using it to hold the point in place, and strengthen the web of the point rails, than there was in using a bolt or rivet to fasten these channel irons to the rails; bolts and rivets being old. Morden adopted it as his mode of connecting the point and wing rails when the angle of the frog or crossing was so great as to make the recess in his trough-plate inapplicable.

I therefore conclude that the proper construction of the second claim requires the point to be constructed as directed in the body of the patent, and also that the U iron, as a mode of connecting the point and wing rails, was in public use and well known before complainant claims to have been the inventor thereof.

It may also, I think, be urged with much force, although it was not pressed in the argument, that the application for this patent must be deemed to have been first made at the time, and not before the time, when the renewed application was made, after the patent allowed in 1877 had elapsed; and, if this position is sound, there can be no doubt that Weir's device, precisely as he had constructed and used it, had been in public use for more than two years prior to his application. The application made by Weir in February, 1879, must, as it seems to me, be considered as his first application, the former application going for naught, and leaving him to stand upon that application as made at the time he renewed it, upon his old specifications and drawings.

The bill is dismissed for want of equity.

CHERRY v. SWAB and others.

(Circuit Court, S. D. Iowa. June Term, 1884.)

PATENT—IMPROVEMENT IN CANS FOR TRANSPORTATION OF CREAM.

The patent of Cherry for improvement in cans for the transportation of cream had been anticipated, and hence there was no infringement by Swab.

This is a bill in equity to restrain the respondents from the infringement of the complainant's patent for an improvement in cans for the transportation of cream and milk, and for an account of profits and damages.

Munday, Evarts & Adcock and *Stoneman, Ricket & Eastman*, for complainant.

Goode, Wishart & Phillips, for respondents.

LOVE, J. It is manifest that in the transportation of cream and milk in cans from the farm to the factory, for the purpose of being made into butter, it is important to prevent the liquid from dashing about the vessel and becoming more or less churned in the course of

transit. Long before the complainant's patent, various contrivances had been adopted to accomplish that purpose. Among these was the plain float fitting loosely inside the can and resting on the surface of the milk or cream. The pressure of the float prevented, to a certain extent, the agitation of the liquid below. This float had, usually, a central ventilating hole or tube. It was generally in use prior to the plaintiff's invention, and it is the can provided with this float upon which the complainant's can is claimed to be an improvement. The plain float was quite effective, so far as the preventing of the churning was concerned, but it was inconvenient and objectionable from the fact that it had to be removed from the can whenever any quantity of cream, however small, had to be poured into the can. This not only caused delay, but it exposed the cream to contamination from dust, dirt, etc. Besides, in very cold weather it is obvious that the cream, adhering to the sides of the float, would become frozen, so as to prevent the float from performing its office within the can.

The plaintiff's alleged invention consists of a can combined with a funnel-shaped float resting on the surface of the liquid, and so fitted to the can as to rise and fall in the vessel with the liquid. The upper surface of the float is concave, resembling closely the shape of an ordinary tin spittoon. There is a hole in the center of the float through which the cream or milk is poured into the can. Thus the complainant claims that the combination unites four elements: (1) The can body; (2) the float; (3) the concave top or funnel; (4) the opening leading from the funnel through the float. The complainant makes no claim to the invention of any of these parts or elements. They were all known prior to the plaintiff's alleged invention. But the complainant claims that he was the first to bring them into combination to produce the result attained. The complainant insists that by means of his combination can the gathering and transportation of milk and cream can be accomplished with greater dispatch, less inconvenience, and better results than by means of any can used for that purpose prior to his invention.

But the real difficulty in the solution of this controversy grows out of the question of novelty. The respondents give evidence showing that many years before the complainant's invention a can was known and used in the state of New York substantially the same in its elements and purposes as the complainant's can. It appears by the evidence that this New York can was in extensive use, and that it combined all the essential parts or elements of the complainant's alleged invention. The models exhibited, together with the evidence, show that the four elements which the complainant's able and learned counsel claim as essential to their combination are all found in the prior New York can: (1) The can body; (2) the float; (3) the concave top or funnel; (4) the opening leading from the funnel through the float.

Judging by a comparison of the models before the court, and by

the evidence adduced, it is difficult to find any essential difference between the principle of the New York can and of the complainant's invention. The immediate purpose of both was to prevent the agitation and churning of the liquid, as far as possible, and to insure its return to the can over the concave surface and through the opening in the center, when the milk or cream happened to be forced by the jostling of the can through the opening of the float. This was accomplished in both cans by means of the float, the concave top, and the opening in the center,—through which the liquid could be poured without removing the float,—all combined with the ordinary milk can in use in the gathering and transport of cream and milk. If the combination and function of the two cans is the same, it is not material to the argument, as counsel seem to assume, that many individuals, in using the New York can, invariably removed the float in filling the can. The question is not, how it was actually used, but rather how it was capable of being used. Farmers, in filling a can for transportation, would very naturally remove the float and replace it when the can was filled. This would be more convenient for them, and the chief function of the float being to prevent splashing and churning in the transit, they would see no object in pouring the milk or cream through the opening in the concave float before delivering it for transportation to the cream-gatherer. But the cream-gatherer himself, in going from house to house collecting the cream or milk in small quantities, would find it highly inconvenient to remove the float and replace it whenever he should receive a pint or quart of the liquid. With him, moreover, the necessity of using the float would commence with the gathering of the cream, and continue to the end of the transit, in order to prevent its agitation and churning.

The complainant's counsel contend that the two cans were not identical; that the float is an essential element of the complainant's combination, and that there was no float in the New York can; that the contrivance in the New York can was not a float, but a close-fitting piston cover, which had to be moved up and down within the can by the application of external force. I do not understand the learned counsel to contend that with respect to all of the other elements the New York can was essentially different from the complainant's combination.

It is insisted that only two witnesses called by the defendants testify to the existence and use of the New York can, and that these witnesses, "by design or accident, in giving their testimony, call these covers "floats," one of them using the two terms—*i. e.*, covers and floats—indiscriminately; and that these witnesses fail to state, either by design or accident, how the cans actually worked, and whether the covers fit tight or loose in the cans." But it so happens that not only the defendants' two witnesses, but several witnesses called by the complainant, testify to the use of the New York cans, and they repeatedly call these contrivances "floats." Why did the

complainant's witnesses call them "floats" if they were not "floats?" If the contrivance was a piston cover, fitted tightly to the can, why did the complainant's witnesses repeatedly misname them "floats?" Was this misleading misnomer the result of "design" on their part? Or, if it was merely an accidental misuse of the words, why did not counsel, in the examination, cause them to explain their meaning more clearly?

Again, it is said that the New York cans "all had tight-fitting piston covers and not floats, whether made flat, convex, or concave," and that "it is perfectly clear from the testimony, and *beyond all dispute*, that these New York cans were nothing but piston-cover cans." This is certainly a grave misapprehension of the testimony: *First*, because the witnesses for both plaintiff and defendant repeatedly call them "floats," and we must assume that they knew the meaning of words. But several witnesses are more explicit. Hawley says, speaking of the New York cans, "The cans we used for transporting milk had what we called covers that *floated on the top of the milk*." The same witness, called in rebutting by the complainant, says, in his testimony in chief, "The float was smaller than the can, and would move up and down in the inside of the can." William Tallman, called by the complainant, says, in chief: "The float to the first can that I used was made so that the float would readily slip in the can. The float had a concave top with a hole in the center and a tube longer than the depth of the float, extending, I think, an inch and a half below the bottom of the flange." Again, same witness: "One of the floats I used fit tight to the can and the other did not. The one I sent to Des Moines did not, and would settle down to the milk. I also had another can that I used. It would readily drop to the bottom of the can of its own weight. It would not remain in the position in which it was placed." Asher J. Barrett, complainant's witness, testifies touching floats used in New York, "Have had floats that fit tight and have had them that would not." John E. Lourey, complainant's witness, "Some of the floats fit tight enough in the cans to stay where you put them." It may be implied that there were other floats known to this witness that did not fit tight to the can and stay where they were put. George L. Cane, complainant's witness, says: "Have used floats on hauling cans, like model No. 7, as long as twelve or fifteen years ago. Never saw a can used with any cover, except what you call a float, except milk cans for shipping milk to the city, and don't know that they had anything but a cover." Other witnesses examined by the complainant testify to having seen made or used cans with covers concave on the top, and with opening in the center closely fitted to the walls of the can. These covers could be moved up and down in the can, and would stay where they were placed. Now, this evidence, taken all together and fairly considered, clearly proves that cans with contrivances of both kinds were used in New York,—some with concave floats resting on the surface of the fluid; others with

what counsel call piston covers, concave at the top and closely fitted to the can. The latter might be moved up and down with the hand. When the liquid was poured into the can the cover could be elevated without being removed from the can; when this was accomplished the cover could be pushed down to the surface of the fluid, thus preventing the churning of the milk or cream. Some purchasers might prefer one contrivance and some the other, and so both would get into use, as they did, according to the testimony of some of the witnesses.

This view sufficiently answers the argument of counsel that "some of the witnesses state they had difficulty in getting the covers in and out, they fit so tight, and that the handles would frequently pull off." Counsel would infer, from this fact, that there were, in fact, no floats, in a proper sense of that word, but only "tight-fitting piston covers." This argument is untenable for several reasons: *First*, because the difficulty experienced by these witnesses was probably with the tight-fitting covers which, as we have seen, were in use as well as the floating covers; *second*, because nothing is more probable than that the cans frequently, in handling, became bruised or battered, so that it would be difficult to remove the float, which would be made to fit the can as closely as possible, consistent with its office of moving in the can on the surface of the fluid; *third*, because if the can and the float did not exactly correspond in form, one being, perhaps, perfectly circular, and the other not,—which might often happen from imperfect workmanship,—there would be difficulty in getting the float or cover in and out of the can. Counsel in this argument particularly advert, as quite conclusive, to the testimony of a witness for defendants, who, as quoted by the counsel, says "he remembers what a time he used to have in getting the covers out." This is in the testimony of Tallman. What he does say is as follows: "It was a part of my work, when I was a boy, to wash these floats. I remember what a time I would have getting the floats out of the can, and getting them in again, *as they would sometimes get burst out of shape.*" The omitted words, "they would sometimes get burst out of shape," change the entire effect of the witness' testimony.

The complainant's invention having been anticipated, his patent cannot be sustained, and his bill must be dismissed, with costs.

THE THREE LIGHTS.

(District Court, W. D. Pennsylvania. May Term, 1880.)

TOWAGE—NEGLIGENCE—LOSS OF BARGE.

The tow-boat Three Lights, having three barges in tow, on her way down the Monongahela river, and being unable to pass under the Smithfield-street bridge at Pittsburgh, on account of high water, tied the said barges to the pier of the Tenth-street bridge, left them there, and returned up the river to bring down other tows, such being the custom of the river. One of these barges afterwards, while so tied up, was sunk by a collision with the tow-boat Bob Connell. *Held*, that no want of reasonable diligence was shown on the part of the Three Lights, and that there are no grounds for holding the said tow-boat responsible for the loss of the barge.

In Admiralty.

Barton & Son, for libellant.

D. T. Watson, for respondent.

Wm. M. Watson and Knox & Reed, for C. R. Stuckslager, co-respondent.

ACHESON, J. On or about January 1, 1880, W. H. Moore, the owner of the tow-boat Three Lights, made a contract with the libellant to tow three barges loaded with coal from McKeesport to the libellant's landing at Cork's run; and, accordingly, the said tow-boat took said barges in charge, and proceeded with them down the Monongahela river. After passing through lock No. 1, it was found that the river was too high for the tow-boat to go under the Smithfield-street bridge, and for this reason the barges were left at a place called Horne's Landing, at the third pier from the north shore of the Tenth-street bridge. It satisfactorily appears that for many years Horne's Landing had been a recognized place for the moorage of loaded and empty coal boats and barges, and was habitually used for such purpose by many coal operators, including the libellant himself. It is also shown that it was a common thing for the libellant to leave his loaded coal boats and barges at Horne's Landing when the river was too high for tow-boats to get under the Smithfield-street bridge. It is in proof, also, that under such circumstances it was customary for tow-boats, after placing their loaded barges at some convenient landing or place of moorage, to return up-stream, and bring down through the locks other tows. This had been the common practice. At the time the Three Lights left the libellant's barges at Horne's, there were but two or three other pieces at the landing, and the whole number was small compared with what had often been moored there at that stage of water. According to the clear weight of the evidence the libellant's barges, on this occasion, were properly and securely placed and tied to insure safety. Having so left these barges at Horne's Landing, the Three Lights proceeded up stream to McKeesport, and took in charge and brought down for the libellant another tow, consisting of several pieces. But the river continuing

too high for the Three Lights to pass under the Smithfield-street bridge, she lay with this tow below the first dam, at or near the gas-works, and while she was there, so engaged, the disaster occurred out of which this suit arose. On the afternoon of January 6, 1880, while the libelant's said barges lay at Horne's Landing, the steam-boat Bob Connell, having one barge in tow, in attempting to reach Canby's Landing, at the pier of the Tenth-street bridge, next to Horne's, and southwardly thereof, ran into one of the libelant's barges—being the lowest one of the fleet—and broke it loose. The barge was carried by the current down the stream and against one of the piers of the Pan Handle Railroad bridge, and, with its cargo of coal, was sunk and lost.

It is claimed that the Three Lights is responsible for the loss, and the purpose of this suit is to enforce such liability. The libel alleges that the Three Lights left the barges at Horne's and went elsewhere, contrary to its duty in the premises, and "notwithstanding notice from the said libelant not to do so." But the only evidence to sustain this latter averment is that of F. H. Anderson, who was the libelant's book-keeper at Pittsburgh, having the general oversight of his business there. He testifies that he met the captain (McMeans) of the Three Lights on the street at Pittsburgh, and was informed by him that the barges were lying somewhere above the Smithfield-street bridge. "I told him" (says Anderson) "he would have to stay with them until he could take them to the landing." Now, if this can be construed into an order to the tow-boat not to go away from the barges, but to remain constantly with them, still, several things are to be said: *First*, it is very doubtful whether such an order was within the scope of Anderson's agency; *second*, the contract of towage was made at McKeesport with John Serena, the libelant's agent there, and it was no part of the contract that in case the water was found to be too high to get under the Smithfield-street bridge the Three Lights was to remain with the tow; *third*, in leaving the barges at Horne's and returning up-stream for more tow the tow-boat acted in accordance with the custom of the trade and the usual course of business in such circumstances; *fourth*, the Three Lights went up-stream to attend to other business of the libelant.

But it is further urged against the Three Lights that the river had fallen, on the morning of January 5th, to 11 feet and 10 inches, so that she might then have passed under the bridge, and should have done so. This fall in the river, however, it would seem, was of very brief duration, not lasting many hours; for, from the record of the pier marks, we find that on the morning of January 7th the stage of water was nearly 14 feet, which was too great for the tow-boat. Under all the circumstances, I cannot discern any want of reasonable diligence on the part of the Three Lights in not attempting to run the Smithfield-street bridge on the morning of January 5th.

Finally, the proximate and real cause of the loss in question was

the bad management of the Bob Connell. That boat had ample room in the river, and should have avoided the libelant's barges. It was broad daylight, and they were plainly visible. Under the proofs, the collision was altogether inexcusable. Save for the culpable negligence of the Bob Connell, no harm would have befallen the libelant's barge; and, upon the whole, I perceive no just ground for holding the Three Lights responsible.

Let a decree be drawn dismissing the libel, with costs.

GRONSTADT v. WITHOFF and others.

'Circuit Court, S. D. New York. July 30, 1884.)

DEMURRAGE—CARGO—PLACE OF DISCHARGE—DELAY—RESPONSIBILITY.

In a bill of lading for empty petroleum barrels there was a condition in regard to demurrage, and thereafter the words "all other conditions as per charter-party," which charter-party contained the provision that "the cargo should be discharged in the same berth where the rails should be discharged." In an action for demurrage against consignees, who, upon arrival of vessel, did not provide a "lighter," the wharf-owners objecting to receive petroleum barrels, *held*, that the libelant was not at fault, because, in selecting a place for the delivery of the cargo in conformity with the contract of the parties, he selected one which was not altogether convenient for the respondents; that the lay days began to run after the ship reached the berth to which she was directed by the consignees of the rails; and that the detention of the ship was caused by respondents' delay.

In Admiralty.

Beebe, Wilcox, & Hobbs, for libelant

E. S. Hubbe, for claimants.

WALLACE, J. The libelant, as master of the ship *Petropolis*, sues the consignees of part of her cargo for demurrage. The general cargo was shipped at Pillau under a charter-party between the vessel-owners and one Nordt, which provided, among other things, that the cargo might consist of empty petroleum barrels and rails to be carried to New York, and also provided that the cargo should be discharged in the same berth where the rails should be discharged. The respondents' barrels were shipped under a bill of lading which, among other things, provided that the barrels should be taken free from on board the vessel in four running days, with demurrage at £10 per day for longer detention, and contained a clause, "all other conditions as per charter-party."

The vessel arrived at the port of New York on May 21, 1880, and upon the request of the owner of the iron rails, which was the major part of the cargo, went to the Erie basin to discharge her cargo, and not being able to reach the wharf moored along-side another vessel. The barrels were above the rails. She remained practically in this position until the afternoon of May 31st, waiting to reach the

wharf. The respondents having been notified on the 25th of her arrival, obtained an order for the delivery of the barrels on May 26th, from the vessel's agent, and being informed that the vessel was at the Erie basin, said they would send a lighter. The wharf-owner objected to receiving empty petroleum barrels on their wharf. On the 27th respondents notified the vessel's agent, if there was no lighter along-side the vessel, to put the barrels on the dock and give them notice. He replied he was willing to put the barrels on the dock if the respondents would arrange with the dock-owners to receive them there, and at the same time notified respondents he should hold them responsible for detention if they did not get the barrels out by the night of the 29th. Nothing more was done by the respondents until the morning of May 31st, when they sent a lighter, and the barrels were delivered on her. Four days were occupied in delivering to the lighter.

The bill of lading adopted all the conditions of the charter-party not inconsistent with its own terms. It has been frequently held that when it is sought to charge a consignee or indorsee of a bill of lading with liability upon the conditions of a charter-party, there must be a plain reference to the charter-party in the bill of lading, and a plain indication of an intention to incorporate them into the contract. *Young v. Moeller*, 5 El. & Bl. 755; *Chappel v. Comfort*, 31 L. J. C. P. 58; *Gray v. Carr*, L. R. 6 Q. B. 522; *Russell v. Niemann*, 33 L. J. C. P. 358. Here the language of the charter-party is unambiguous and explicit, and it cannot be doubted is sufficient to adopt the conditions of the charter-party into the bill of lading. *Smith v. Sieveking*, 4 El. & Bl. 945; *Wegener v. Smith*, 24 L. J. C. P. 25; *Davis v. Wallace*, 3 Cliff. 130. By thus adopting the terms of the charter-party not inconsistent with those of the bill of lading, the consignees of the barrels agreed with the carrier that their part of the cargo might be delivered at the same berth where the iron rails should be delivered.

In the absence of such a stipulation it is probable that the charterer would have had the right to select the place of delivery, but it is clear that the respondents could not have exercised that right without the concurrence of the owners of the rest of the cargo, and that the master's duty towards them would be fulfilled if he selected a suitable and convenient place for the delivery of the whole cargo.

Under the present contract, however, it seems reasonable to conclude that it was the intention of the parties that the master should consult the convenience of the consignees of the rails in the selection of the place of delivery. This is suggested, not only by the language of the contract, but by the situation of the parties, and their relations to the cargo and to each other. The cargo was to be delivered at a port where it is well known there are serious difficulties in landing either iron or petroleum barrels in the usual places for landing general cargoes. Many wharf-owners object to receiving iron upon their wharves on account of its weight, and the danger consequent thereon,

and many also object to receiving empty petroleum barrels, because of their combustible character. And this construction of the meaning of the contract is enforced by that placed upon it by the parties themselves, all of whom seemed to concede that the master had properly proceeded to the place where he did proceed, and that under the circumstances it was the duty of the respondents to provide a lighter to receive their barrels. If an instrument is ambiguous, and both parties have acted upon a particular construction of it, that construction, if in itself admissible, will be adopted by the court. *Chicago v. Sheldon*, 9 Wall. 50, 54; *Jackson v. Perrine*, 35 N. J. Law, 137; *Stone v. Clark*, 1 Metc. 378; *Forbes v. Watt*, L. R. 2 Sc. & D. 214.

The libelant followed the instructions of the consignees of the iron, and proceeded to a place of discharge within the port where the iron could be delivered on the dock, but where the dock-owners would not permit the petroleum barrels to be landed. No objection was made by the respondents when it was suggested that they should provide a lighter; and they undertook to obtain one. They knew that the iron could not be discharged until their barrels were removed. In consequence of their delay the lay days expired.

It must be held that the libelant was not in fault because in selecting a place for the delivery of the cargo in conformity with the contract of the parties he selected one which was not altogether convenient for the respondents; that the lay days began to run after the ship reached the berth to which she was directed by the consignees of the rails; and that the detention of the ship was caused by respondents' delay.

A decree for four days' demurrage, at £10 per day, and interest, is directed, with costs to the libelant in the district court, and the costs of this appeal.

THE ASHFORD.

(*District Court, D. New Jersey. July 17, 1884.*)

COLLISION—CONTRADICTORY SIGNALS.

Libel for damages received in a collision, alleged to have occurred through the fault of the respondent in blowing contradictory signal whistles. The court investigates the conflicting testimony, and awards the damages as asked.

Libel in Rem.

Beebe & Wilcox, for libelant.

H. Kettell, for claimant.

Nixon, J. This libel is filed to recover damages for a collision which occurred on the twenty-first of November, 1883, on the Erie canal, about one-half mile west of Albion, between the libelant's boat, the *Rapid*, and the claimant's boat, known as No. 104, which was

the consort of another boat, also owned by the claimant, and called the Ashford. They were canal steam-boats, and were loaded, the Rapid having on board a full cargo of coal, and drawing about six feet of water. The Ashford and No. 104 were attached together, the latter in front of the former, and being propelled and controlled in all her movements by her. The Rapid was bound west towards Buffalo, and the Ashford east towards Troy. At a short distance from the point of collision there was a bend in the canal to the northward or tow-path side. The canal was about 100 feet wide where the surface of the water touched the bank, but the banks were sloping, so that laden boats of the draught of six feet could not approach nearer than ten feet of the side of the canal without touching the bottom. The collision occurred between 4 and 5 o'clock in the morning, which was before daylight at that season of the year. The boats had their regulation lights burning. Their lights were seen, the one by the other, when the boats were from a quarter to half a mile apart. There is conflicting testimony in regard to their speed. The Ashford had the current in her favor, and was going about three miles an hour, while the Rapid was proceeding at a slower rate of speed. About the time of observing each other the Ashford first sounded one whistle, which was at once answered by the Rapid; then three whistles, which the Rapid replied to with three. Here the proofs radically diverge with regard to the subsequent whistles. The libellant contends that the Rapid shortly afterwards gave three whistles, while the claimant insists that only two were given, which he promptly answered with two, and turned his boat to the tow-path side of the canal, as the two whistles signaled him to do. The general rule of the road for boats passing on the canal is for each to go to the right. The signal of one whistle means that movement, the boats passing on the port side of each other. Two whistles are a call for the boats to go to the left, giving their starboard side to each other. Three whistles are calls to slow up and slacken their speed. Remembering these rules and the signification of the whistles it is easy to account for the collision. The Ashford told the Rapid, by sounding the one whistle, that she wished to pass to the right. The Rapid assented by her reply. The collision took place on the tow-path side of the canal, where the Rapid was lying in obedience to the first signal. The Ashford, steaming from the heel-path, struck the port bow of the Rapid a few feet aft of the stem with such force that she almost immediately filled and sank. She claimed that she was governed by the signal of two whistles of the Rapid in thus going over to the tow-path side. On the other hand, the Rapid denied that she sounded two whistles, and insisted that she gave three to warn her to slow up. There is great conflict in the testimony on this point, but I think the weight is with the libellant, that three whistles were blown. The collision was caused by this mistake of the Ashford. and there must be a decree for the libellant, with costs.

McELROY v. KANSAS CITY.

(Circuit Court, W. D. Missouri, W. D. August, 1884.)

1. CONSTITUTIONAL LAW—MISSOURI CONST.—BILL OF RIGHTS, § 21—PROPERTY TAKEN OR DAMAGED—PUBLIC USE—COMPENSATION.

The damage to property, by the constitution of Missouri, is placed upon the same basis as the value of the property taken, and neither can be done without compensation first made. This constitutional guaranty needs no legislative support, and is beyond legislative control.

2. SAME—CHANGE OF GRADE OF STREET—DAMAGE.

When property is damaged by establishing the grade of a street, or by lowering or raising the grade of a street previously established, it is damaged for public use, within the meaning of the constitution.

3. SAME—INCORPORATION OF CITY BY SPECIAL CHARTER BEFORE ADOPTION OF CONSTITUTION.

That a city was incorporated under a special charter before the adoption of the constitution of 1875, and its charter continued in force, will not render the constitutional provision in respect to damages to property inoperative within the territorial limits of such city.

4. SAME—ENJOINING MUNICIPAL CORPORATION—MATTERS CONSIDERED.

A chancellor, in determining an application for an injunction, must regard not only the rights of complainant which are sought to be protected, but the injuries which may result from the granting of the injunction; and in applying this rule in a case where it is sought to enjoin a municipal corporation against which an action for damages would lie, from changing the grade of a street, the court should consider (1) the amount of injury to the complainant; (2) the solvency of the defendant, and (3) the character and importance of the public improvement.

5. SAME—CONDITION PRECEDENT TO RIGHT TO PERFORM ACT ENJOINED—ABILITY OF DEFENDANT TO PERFORM CONDITION.

Where the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will usually be granted until the condition is complied with.

6. SAME—INABILITY OF DEFENDANT TO PERFORM CONDITIONS—FORM OF ORDER.

Where the defendant has an ultimate right to do the act sought to be enjoined, upon certain conditions, and the means of complying with such conditions are not at its command, the court will endeavor to adjust its order so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining defendant from the exercise of its ultimate rights.

On Application for Injunction.

Bryant & Holmes, James Scammon, and Botsford & Williams, for plaintiff.

Karnes & Ess, Jeff Brumback, and Wash. Adams, for defendant.

BREWER, J. The complainant in this case seeks an injunction to restrain the grading of a street in front of his lot. He is the owner of a lot on the south-east corner of Sixth street and Tracy avenue, having a frontage on Tracy avenue of $41\frac{1}{2}$ feet and on Sixth street of 110 feet. The grade on Tracy avenue has been established, and the avenue graded in front of complainant's property. This grade was 220 feet at the corner of Tracy avenue and Sixth street above the city directrix, or base line from which the elevations of the streets in said city are determined. On February 25, 1884, the defendant, by an ordinance entitled "An ordinance to grade a part of Sixth street

and establish a grade thereon," established the grade at the intersection of Tracy avenue and Sixth street at 211 feet above said city directrix, and 14 feet below the established grade of Tracy avenue at the same place, and ordered that said Sixth street be graded upon such grade. The effect of such ordinance, if carried into execution, would be to leave the lot of complainant many feet above Sixth street, and seriously to damage the value of the property. This, in a general way, is all that needs to be stated in order to present the preliminary questions raised by counsel upon this application for an injunction. While the interests involved in this case may not be large, yet the questions are of vast importance, and have received, as they deserve, the most serious consideration.

First. The constitution of Missouri, adopted in 1875, in section 21 of its bill of rights, provides "that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners, of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, the property shall not be disturbed, nor the proprietary rights of the owner therein be divested."

It is beyond question that the grading of Sixth street will cause some damage to the complainant's property. It is conceded that no arrangement has been made between the defendant and him, or any other person, for the payment of damages, and it is also conceded that the legislature of Missouri has made no provision for the assessment of such damages. It will be perceived that no property of the complainant has been taken in the sense in which this phrase is generally used in the law, and his claim rests upon the proposition that his property will be damaged, and he insists that before it can be so damaged by the grading of the street, the injury to this property must first be ascertained and paid to him. It is a familiar rule, enforced by constitutional provisions in most of the states, if not also resting upon an antecedent basis of absolute right, that private property cannot be taken for public use without compensation. It is generally established that such compensation shall be ascertained and paid before the property is taken, and the universal rule of decision, at least where such constitutional provisions exist, has been to restrain the taking of private property until after the ascertainment and payment of the compensation. It is also a familiar rule that where no such constitutional provisions as the one in question exist, if no property be in fact taken, the incidental damages which may result to adjoining property gives no right of action to the sufferers, and furnishes no basis for interference by the courts or otherwise. But the contention is that this constitutional provision places the damage to property on the same basis as the taking of property, and that before property can be either taken or damaged, compensation must first be received; that the joining of the two words "taken" and "damaged"

subjects them to the same rules; and the argument is that as heretofore the taking has always been enjoined until the compensation is paid, now the damage will in like manner be restrained until compensation therefor is paid. As heretofore stated, the legislature has by statute provided means for ascertaining the value of property taken, but none for ascertaining the injury done to property damaged but not taken. Nevertheless, complainant insists that this provision of the constitution is imperative; that it does not depend for its force upon the legislature; that it cannot be defeated by the want of action on the part of the legislature; and that the courts are bound absolutely to enforce its mandates, and restrain any public action which either takes or damages private property until the value of the property taken, or the amount of damage done to property not taken, has been ascertained and paid. It is obvious that this question is of momentous importance, for as no provision has been made for ascertaining the damages to property not taken, the only way that this can now be ascertained is by personal agreement, which, if the claim of complainant is wholly sustained, would place every public improvement at the mercy of any party whose property is injured thereby.

This constitution was adopted in 1875; there have been many sessions of the legislature since; no action has been taken. There is no power to compel action by the legislature; it may leave the matter unattended to indefinitely in the future; and the question is, can the imperative mandates of the constitution be practically defeated by the want of action on the part of the legislature? I am not insensible of the importance of this question, or of the consequences which may hinge upon its decision; but I think that the duty of the court is plain. The constitution is the final law, measuring all private and public rights, whose commands, legislatures and courts must respect; whose mandates, when imperative, must be enforced, regardless of all consequences. As the established rule of construction has been, under constitutions prohibiting the taking of private property for public use until compensation was first made, to enforce that mandate irrespective of all legislative action, the same rule must obtain in this case. The damage to property is placed upon the same basis as the value of property taken, and neither can be done without compensation first made. In other words, uniting "property damaged" with "property taken" in the same clause and subject to the same prohibitions, places them in the same category as to judicial action. I see no logical escape from this conclusion.

When the constitutional convention met, the rule of protection against the taking of private property had long been settled, and must have been familiar. It did not attempt to prescribe two rules. It did not even make two enactments, but simply added "property damaged" to "property taken;" and for the courts to now hold that under the same language two rules were prescribed, is to create a distinction which has no just foundation, and would be mere judicial legis-

lation. I know that there are many provisions of the constitution which are not self-executing,—which are, so to speak, dormant until the legislature acts; as where rights are given, to be exercised in a way provided by the legislature. I think, too, in these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own. I hold, therefore, that the rule of the constitution is the same in respect to property damaged as to property taken, and that such constitutional guaranty needs no legislative support, and is beyond legislative destruction.

See, in support of these views, the following authorities: *Johnson v. Parkersburg*, 16 W. Va. 402-422; *Blanchard v. City of Kansas*, 16 FED. REP. 444; *Chambers v. Cincinnati R. Co.* 69 Ga. 320; *Thompson v. Grand Gulf R. R.* 3 How. (Miss.) 240; *Oakley v. Williamsburgh*, 6 Paige, 262; *Gottschalk v. C., B. & Q. Ry.* 14 Neb. 550; S. C. 16 N. W. Rep. 475; *Mallandin v. U. P. Ry.* 14 FED. REP. 394.

Secondly. It is insisted by the defendant that the words "damaged for public use" do not reach to the injury in question. It is unnecessary to enter into a discussion of this question, for it has been settled both in this court and in the supreme court of the state, (*Blanchard v. City of Kansas*, 16 FED. REP. 444; *Werth v. City of Springfield*, 78 Mo. 107,) in which latter case the court, after referring to this constitutional section, uses this language:

"When property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the constitution."

Thirdly. It is insisted that as the defendant was incorporated under a special charter before the adoption of the constitution of 1875, under section 53, art. 4, and section 7, art. 9, of such constitution, that charter was continued in force, and is the controlling law as to the defendant, and that this constitutional provision, in respect to damages to property, is not operative within the territorial limits of the defendant. As the immunity from liability for the damage to private property injured, but not taken, was not given by, and did not exist through, any provisions of this charter, but by virtue of a general rule in force everywhere, I do not see how the continuance of the charter, even if it be continued in full force, as claimed, continues this immunity. Whatever rights or immunities are derived from a charter may be preserved so long as that charter continues in force: but the continuance of a charter cannot preserve rights or immunities which do not flow from it. The rule of immunity is one depending upon general law, and when that general law was changed, the rule was changed, and changed wherever that general law was operative. But it may well be questioned whether, if this was a special immu-

nity given by the terms of the charter, it would continue in force after the adoption of the constitution, since in section 1 of the schedule it is declared that "the provisions of all laws which are inconsistent with this constitution shall cease upon its adoption."

Fourthly. It is urged that equity will not interfere when there is a plain and adequate remedy at law; that if complainant's property is damaged by the grading of this street he will have an action at law against the city for such damages; and that such action is a plain and adequate remedy. As against this, complainant says that this is a constitutional right; that damages at the end of a long and wearisome litigation is no adequate recompense; and that an individual contesting in an action with the public is at such a disadvantage that equity will not remit him to such action, but interfere in advance to enforce protection. Various authorities are cited on both sides upon these several questions; authorities which, while I have examined, I deem it unnecessary to notice and discuss, preferring to lay down some general propositions which control in the decision that I have reached.

First. A chancellor, in determining an application for an injunction, must regard not only the rights of the complainant which are sought to be protected, but the injuries which may result to the defendant or to others from the granting of the injunction. If the complainant's rights are of a trifling character, if the injury which he would sustain from the act sought to be enjoined can be fully and easily compensated, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer a large inconvenience if the contemplated act was restrained, the lesser right must yield to the larger benefit; the injunction should be refused, and the complainant remitted to his action for damages. This rule has been enforced in a multitude of cases, and under a variety of circumstances, and is one of such evident justice as needs no citation of authorities for its support.

Second. When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was large or small, but have contented themselves with holding that as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined.

Third. Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, and the means of complying with such conditions are not at his command, the courts will endeavor to adjust their orders so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. Thus, in the case at bar, the defendant has of course the ultimate right to grade this street. As a condition of such right is a payment of damages, but it has no means of ascertaining those damages; no tribunal has been created, no provision of law made, for their ascertainment. Hence, if possible, the court should provide for securing to the defendant this ultimate right, and at the same time give to the complainant the substantial benefit of the prior conditions.

Fourth. In applying the rule first stated to a case like the one at bar the court should have principal regard to three matters:

(1) The amount of injury to the complainant. It is obvious that a grade of a single foot in front of a city lot would work but trifling injury, while on the other hand the grade might be such as practically to destroy the value of the adjacent property. In the one case it would seem a great hardship to tie up public improvement because of some trifling injury to the complainant, the amount of which injury was not attainable by any established means, and therefore that the party might justly be left to his action for damages; while in the other case the court might well insist that the value of complainant's property should not be wholly wrecked until such value has been paid to him.

(2) The court will consider the solvency of the defendant. If some irresponsible corporation should seek, in the exercise of the power of eminent domain, and under the guise of the contemplated public improvement, to do serious damage to property, the court should properly say that the owner was not bound to take the chance of collecting his damage from such a corporation, and imperatively require the prior adjustment and payment of such damages; while, if the party attempting the improvement was a corporation of established and permanent solvency, the court might say that the complainant would run little risk in pursuing simply his action for damages.

(3) If the improvement was one of great public importance, the court would justly regard that as a reason for not lightly interfering with the work, while if the improvement was more of a personal speculation and for private gain, the prior protection of the complainant would be most rigorously insisted on. Thus, if in the center of a large and thriving city like the defendant some improvement was contemplated which the necessities of business proclaimed to be urgent, the court on no slight consideration should interfere to delay or restrain it; while, on the other hand, if it was some matter in the outskirts of the city, having obviously principal reference to the private speculation of the individual, and of no earnest or urgent demand of

public good, the attention of the court would be properly directed to the full protection of the complainant's prior right. I think such considerations as these, and others of a similar nature, when properly regarded by the courts, will afford ample protection to individual rights, without unnecessary interference with needed public improvements; and that until the legislature makes suitable provision for the ascertaining of damages to property not taken, the courts should be guided by them in determining all applications of this nature for an injunction.

Now, looking at the facts of this particular case, it is evident that the injury to complainant's lot will be serious; that the solvency of the defendant is unquestionable, and that any judgment for damages against it can easily be collected; and also that the improvement is not one of pressing public necessity, but in the outskirts of the city, and having reference mainly to private benefit and individual speculation. I think, therefore, that the complainant is entitled to a restraining order, but at the same time it should not be absolute and unconditional.

The section of the constitution provides that this compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders. It is within the power of a court of chancery to provide a board of commissioners. The order, therefore, will be that upon the giving of a bond in the sum of \$3,000, and the filing of a stipulation to accept such damages as shall be ascertained in the manner hereinafter provided in full satisfaction of all claims against the defendant, the defendant will be restrained from grading said street: provided, that at any time the defendant may, upon 20 days' notice, apply to either of the judges of this court for the appointment of a board of commissioners of three freeholders to ascertain and report the amount of damages which complainant will sustain by reason of the grading of said street, and upon the payment of the damages so reported by such commissioners the injunction will be vacated. The report of a majority of the commissioners will be the report of the board, and either party may appeal to the judge appointing such commissioners for a review of their report.

Before closing this opinion it is proper to notice one matter suggested by counsel for the defendant; that is, that if an application of this kind be entertained by the court, it will put a permanent stop to all public improvement, because one after another of the parties claiming to be damaged thereby will, from time to time, present his application for an injunction. But no such result will follow. *First.* Any party undertaking any public or *quasi* public improvement, must, before commencement, prepare for paying the value of all property taken, and all damages to property not taken. This, under the constitution of the state, is the condition of the appropriation of private property, and if any individual or corporation contemplates any appropriation of or injury to private property without placing itself in

the condition to make such previous payments, no cause of complaint can exist. Assuming that such provision has been made, and without it the sanctity of private property should never be invaded, then the courts will so control their orders as not materially to interfere with or postpone the contemplated improvement. If any parties claiming to have sustained damages do not immediately present their claim, and so have them all adjudicated in a single action, or at the same time, the court will very properly say to them that their delay is sufficient ground for not delaying the prosecution of the work, and will simply secure to them, by appropriate orders in the manner heretofore indicated, compensation for the damages they have sustained, and thus, without delay to the improvement, protection to the individuals will always be enforced. I think, therefore, the court can give free scope to any improvement, and at the same time fully protect the rights of the individual.

I see nothing else requiring notice.

FARMERS' LOAN & TRUST Co. v. MISSOURI, I. & N. RY. Co.

LEE and others v. FARMERS' LOAN & TRUST Co. and others.

(Circuit Court, S. D. Iowa, E. D. June Term, 1884.)

1. CORPORATIONS—PROPERTY OF INSOLVENT CORPORATION—HOW TREATED IN EQUITY.

While the property of an insolvent corporation is to be treated in equity as a trust fund primarily for the payment of its debts, lien creditors have no greater equity to payment out of such fund than general creditors. As both sets of creditors have contributed to the extent of their respective debts to the assets of the insolvent, in strict justice they should share *pro rata* in the assets.

2. SAME—PRIORITY OF PAYMENT—SECURED CREDITORS—EQUITABLE LIEN OF UNSECURED CREDITORS.

The secured creditor is ordinarily entitled to priority of payment, because, with equal equity, he has a legal lien which equity will recognize and enforce; but when the unsecured creditor has some peculiar and superior equity, the court may establish his debt as an equitable lien upon the property paramount to the secured debt.

3. SAME—RIGHTS OF STOCKHOLDERS—DISPOSITION OF FUND BY SECURED CREDITORS—PROTECTION OF UNSECURED CREDITORS.

The claims of unsecured creditors are in equity always superior to those of the stockholders in the distribution of the trust fund. Nor will the secured creditors, after bringing the trust property within the jurisdiction of the court, be permitted, by any private arrangement with the common debtor or otherwise, so to dispose of the property as to seriously and unnecessarily prejudice the claims of the secured creditors. They will not be allowed for their own benefit, or for the common interest of themselves and the debtor, to place the surplus which may exist after the satisfaction of their own claims beyond the reach of the unsecured creditors; nor will they be permitted, beyond what is needful for their own complete security and indemnity, to hinder or delay the general or unsecured creditors.

4. SAME—INTERVENTION—PARTICIPATION IN TRUST FUND—JUDGMENT AT LAW.

It is not necessary to the right of intervention, to participate in a trust fund *in custodia legis*, that the intervenor should first obtain judgment at law, or that he should have any lien upon the fund.

5. SAME—RAILROAD MORTGAGE—FORECLOSURE—CONSENT ORDER—LEASE OF PROPERTY—LIEN OF UNSECURED CREDITORS ESTABLISHED.

Complainants obtained a decree to foreclose a mortgage executed on all of its property by the Missouri, Iowa & Nebraska Railway Company to secure its bonds, but instead of making a sale of the property entered into an arrangement among themselves, with the consent of all parties in interest, by which the entire property was transferred by a perpetual lease to the Wabash, St. Louis & Pacific Railway Company, that stipulated to pay to a receiver provided for in the order of the court made under such arrangement, as rental, 30 per cent. of the gross earnings of the insolvent road which might accrue from lessee's operation thereof, to be applied by him in payment of the interest on the bonds issued by the lessee company and accepted in lieu of the bonds of the lessor company, and secured by mortgage on the whole property of the lessor company, after payment of taxes, any surplus to be paid to the lessor company; thus making no provision for payment of the floating debt of the insolvent corporation. The holders of certain unsecured notes given in liquidation of a debt growing out of the construction of a part of the insolvent's road, and to prevent a lien thereon, intervened after the foreclosure decree and prayed to have their debts established as equitable liens upon the property and funds of the insolvent road paramount to the lien of the mortgage. *Held*, that they were entitled to relief as prayed.

In these proceedings the original bill and cross-bill were filed to foreclose a railway mortgage of the Missouri, Iowa & Nebraska Railway Company to the Farmers' Loan & Trust Company, to secure the bonds of the former company. Said mortgage covered the entire property of the said Missouri, Iowa & Nebraska Company. The intervenors came in by leave of the court after the decree of foreclosure had been entered, to assert by petition their claim to have their debts against the Missouri, Iowa & Nebraska Railway Company established as equitable liens upon the property and funds of the defendant railway company paramount to the lien of the mortgage.

The cause is now before the court for hearing, upon exceptions to the master's report upon the intervening petitions, which were referred to him by an interlocutory order. The facts appearing by the evidence and found by the master, so far as they are material to the present hearing, and so far as they are not fully stated in the opinion of the court, are as follows:

First. That the complainants, on the twenty-second day of October, 1880, obtained a decree in this court in the foreclosure proceedings, and that, instead of executing the same in the ordinary course by a sale of the mortgaged property, they, without any sale under the decree, entered into arrangements among themselves, all parties in interest consenting, by which the entire railway property of the defendant company was transferred, by a perpetual lease, to the Wabash, St. Louis & Pacific Railway Company; that said last-named company stipulated and agreed to pay as rental 30 per cent. of the gross earnings which might accrue from their operation of the road in the manner and for purposes fully stated in the opinion of the court. In and by said arrangement it was further stipulated and agreed that the bondholders of the defendant railway company should surrender for cancellation the bonds of said company, and accept, in lieu of the same, new coupon bonds to

be issued by said Wabash Company, bearing interest, payable semi-annually, and secured by a new mortgage, to be executed by said Missouri, Iowa & Nebraska Railway Company, upon its entire railway property, transferred, as aforesaid, to said Wabash Company, all of which was accordingly done; that said Wabash Company, in order to provide for the payment of the floating debt of said Missouri, Iowa & Nebraska Railway Company, which, by the transfer of its property, was left wholly without means to pay the same, in consideration of valuable concessions by said defendant company and the bondholders, stipulated and agreed to pay the said floating debt of said Missouri, Iowa & Nebraska Company in the manner and by the means fully shown in the opinion of the court; that in order to carry into effect the arrangement so agreed upon, and to provide for the payment of said floating debt, all the parties to the arrangement,—the bondholders consenting,—immediately upon obtaining said decree of foreclosure, obtained from this court a consent decree, fully stated in the opinion of the court, providing, among other things, for the appointment of a receiver, to whom the said Wabash Company was to pay said 30 per cent. rental monthly, to be applied by the receiver, under the orders of the court, to the payment of said floating debt.

All other material facts will fully appear in the opinion of the court.

The intervenor the Chase National Bank is one of the so-called floating creditors of the said defendant railway company, and is now the holder of two negotiable promissory notes executed by the defendant company, dated August 13, 1878; one for the sum of \$2,000, the other for the sum of \$2,500, with interest from date. Said notes were given in a settlement with the payee, and for the purpose of liquidating a debt of said railway company, growing out of the construction of the first 90 miles of their railroad in 1871 and 1873 by the payee; the main purpose of said settlement being to free said railway property from any possibility of a lien thereon in favor of said payee prior to that of the bonds secured by the mortgage of said railway company. The intervenor Henry Hill is also the owner and holder of two like notes; one for \$2,000, the other for \$2,500, with interest, amounting to the sum of \$6,192.13.

Hagerman, McCrary & Hagerman, for intervenors.

Felix Hughes, contra, for complainants.

LOVE, J. The claims of these so-called floating creditors stand in my judgment upon peculiar ground. The property of a corporation is to be treated in equity as a trust fund primarily for the payment of its debts. This doctrine has been so often propounded by the courts that it is unnecessary to cite authorities to sustain it. See *Railroad Co. v. Howard*, 7 Wall. 409, 410, 414. And this trust is to be administered by no means solely for the benefit of the lien creditors. Lien creditors have no greater equity to payment out of the effects of an insolvent corporation than general creditors. Both classes of creditors have contributed to the extent of their respective debts to the assets of the insolvent, and in strict justice they should share *pro rata* in the assets. Indeed, it is not unfrequently the case that the unsecured creditor has in equity claims superior to the lien creditor upon the estate of the insolvent. The secured creditor is

ordinarily entitled to priority of payment, because with equal equity he has a legal lien which equity will recognize and enforce. But there are cases in which a court of equity postpones a lien creditor to an unsecured creditor having some peculiar and superior equity. In these cases the court establishes the floating debt as an equitable lien upon the property paramount to the secured debt. *Fosdick v. Schall*, 99 U. S. 235-252; *Burnham v. Bowen*, 111 U. S. 776; S. C. 4 Sup. Ct. Rep. 675.

The court, treating the property of an insolvent corporation as a trust fund, will not ignore the rights and interests of the unsecured creditors. Their claims are in equity always superior to those of the stockholders in the distribution of the trust fund. Nor will the secured creditors, after bringing the trust property within the jurisdiction of a court of equity, be permitted, by any private arrangement with the common debtor or otherwise, so to dispose of the property as to seriously and unnecessarily prejudice the claims of the unsecured creditors. The lien creditors will not be allowed for their own benefit, or for the common interest of themselves and the debtor, to place the surplus which may exist after the satisfaction of their own claims beyond the reach of the unsecured creditors. *Railroad Co. v. Howard*, 7 Wall. 392; *In re Howard*, 9 Wall. 175. Beyond what is needful for their own complete security and indemnity, the secured creditors will not be permitted to hinder or delay the general or unsecured creditors.

Keeping these principles distinctly in view, let us proceed to consider what the secured creditors, in conjunction with the common debtor, attempted to accomplish in the present case. The bondholders of the Missouri, Iowa & Nebraska Railway Company, through their proper trustees, brought their mortgage here for foreclosure. They obtained from this court a decree of foreclosure, but they purposely dispensed with a sale of the property. The property was thus placed within the jurisdiction of the court. The parties to the suit then, by an arrangement among themselves, and with a view exclusively to their own interest, took measures to dispense with a sale, and so to dispose of the property as to place any surplus which might have arisen from a sale entirely beyond the reach of the unsecured creditors. Suppose there had been a judicial sale of the railroad company's property in the regular course of proceeding, who can say that there would not have been a surplus over and above what would have been sufficient to pay the secured creditors? It will not do to say that there would have been no surplus fund from the sale of the mortgaged property. This no one has any warrant judicially to affirm. The presumption is that the property would have produced a greater sum than the mortgage debt, since capitalists are not apt to receive property as security without a large margin of value over and above the sum secured. And if such surplus had arisen, it would, undoubtedly, have been a trust fund *in custodia legis*, to be distributed

among the unsecured creditors. It would certainly have been competent for the court to allow all creditors, with or without liens, to intervene in the suit and claim satisfaction out of a trust fund held primarily for their benefit. The court surely would not have permitted its officers, in the face of the unsecured creditors praying for relief, to pay over such a surplus fund to the insolvent corporation or its stockholders. See *In re Howard*, 9 Wall. 184.

What was the arrangement to the prejudice of the general creditors by which the bondholders, the defendant railroad company, and the Wabash, St. Louis & Pacific Railway Company attempted to place the property of the debtor corporation beyond the reach of the unsecured creditors? Without going into details, the scheme, as consummated pending the suit, was, in brief, that the debtor company should, by a perpetual lease, transfer the whole of its property to the Wabash, St. Louis & Pacific Company; that the last-named company should pay a rental of 30 per cent. of the gross earnings derived from their operation of the road, and apply the same as hereinafter stated; that the bondholders of the Missouri, Iowa & Nebraska road should receive in exchange the bonds and stock of the Wabash road for the bonds of the Missouri, Iowa & Nebraska road, and that they should deliver up the old bonds to be canceled; that the Missouri, Iowa & Nebraska Railroad Company should execute a new mortgage to trustees upon their railway property, to secure the payment, interest and principal, of the Wabash bonds. The Wabash Company, on its part, in consideration of valuable concessions of both the bondholders and the Missouri, Iowa & Nebraska Company, agreed to pay the floating debt of the Missouri, Iowa & Nebraska Company. It was also stipulated that the Wabash Company should have the right to apply the 30 per cent. rental to the payment of the semi-annual interest upon its own bonds, and the taxes upon the property. Any balance of the 30 per cent. rental was to be paid by the Wabash to the lessor.

By this arrangement the bondholders obtained a new and, as they supposed, unquestionable security for their debt. The Wabash Company, whose bonds they received, was supposed to be entirely solvent. The stockholders of the Missouri, Iowa & Nebraska were also provided for, since it was reasonably certain that under the management of the great and powerful Wabash Company the earnings and value of the road would be greatly increased, and the stock enhanced in value. Thus the entire property of the Missouri, Iowa & Nebraska Railroad Company was disposed of to the Wabash Company for the benefit of its bond and stock holders, leaving the debtor company without any means whatever for the payment of its floating debt.

It is evident that the parties to this arrangement, who were also parties to the foreclosure suit, recognized the fact that while all of the property of the Missouri, Iowa & Nebraska Railroad Company was thus transferred, leaving that company without any means what-

ever to pay debts, no provision was thus far made for the security of the floating creditors. This is made evident by the petition presented to this court by the trustees in the mortgage, (complainants in the foreclosure suit,) and the order they obtained after the signing of the decree of foreclosure at the October term, 1880. The complainant trustees, after the signing of the decree of foreclosure, presented their petition to the court, upon the showing of which, and with the consent of all parties, including the bondholders, the court made the following order.

"That, upon the petition of the complainant, setting forth that the defendant corporation has leased its line of railway property and franchises to the Wabash, St. Louis & Pacific Railway Company, and that the Wabash, St. Louis & Pacific Railroad Company has been in possession of said leased property, using and operating the same, since October 1, 1880, and has been and is in the receipt of the entire incomes, tolls, and earnings of said railway, under said contract of lease; that said railway company has no funds wherewith to pay debts, except the rent reserved in said lease, and that said debts are or may become liens against its railway property paramount to said first mortgage lien; that all parties, namely, the bondholders, by counsel or in their own proper persons, the Missouri, Iowa & Nebraska and the Wabash Companies, and the mortgage trustees appearing and consenting, the court orders and decrees: (1) That James Fitz Henry be appointed receiver of the rent reserved to the Missouri, Iowa & Nebraska Railroad Company, under the terms of said lease, to a sum equal to 30 per cent. of the gross income derived from the operation of the Missouri, Iowa & Nebraska Railroad; (2) that the Wabash Company be and is required, in lieu of the payments required by the lease, to pay to said Fitz Henry, receiver, monthly, on or before the fifteenth of each month, the full amount of 30 per cent. of the gross income aforesaid, said payments to commence on the fifteenth day of November, 1880, and to include the earnings of October, 1880, and so to continue from month to month till otherwise ordered by the court; (3) that out of the funds so received the receiver shall pay, under the order and direction and subject to the approval of the court, all taxes and assessments against said property, all claims and demands due by said Missouri, Iowa & Nebraska Railroad Company for labor and materials furnished to said railway company in its operation, and for supplies used in the operation and repairs of the road, while said Missouri, Iowa & Nebraska Company was in possession and operating the same, and all judgments for damages for stock killed and injured on said railway, which constitute a lien on said railway paramount to said mortgage bonds; (4) that the Wabash should make reports to the receiver monthly of its earnings, showing gross income, etc.; (5) that the receiver should give bond, etc.; (6) but this order shall be without prejudice to the right of any person interested to move for the appointment of a receiver of the property of said defendant railway company."

It is thus evident that the parties to the foreclosure suit aimed, by this consent order, to make provision for such floating debts as they assumed *might* become "liens against the railway paramount to the first mortgage lien." They assumed to exclude all other floating debts, however just and meritorious. For this purpose they provided for the appointment of a receiver, and the payment into his hands of the 30 per cent. fund. The 30 per cent. fund was thus brought into court, and it is a trust fund which the court must dis-

pose of for the benefit of creditors according to equity and good conscience. The parties to the suit could thus, by a consent order, bring the fund into court, but they could not dictate the purposes to which it should be applied, so as to affect the rights of other parties intervening by the permission of the court. These intervenors are in no wise bound by the provisions of an order to which they were not parties, excluding them from participation in the fund. Neither, certainly, are the hands of the court tied by the provisions of the order as to what particular creditors should be paid out of the fund. For, in the first place, the judgment of the court could be considered as as binding only upon the consenting parties then before it, not as against the intervening claimants who have since come in by permission to assert their rights. See *In re Howard*, 9 Wall. 175. But, in the second place, this 30 per cent. fund is only a small fragment of the entire railroad property over which the court has full and complete jurisdiction. The jurisdiction of the court over the property as a trust fund has never been disturbed or lost. In the very order now in question, the court, apparently out of abundance of caution, provided that its plenary jurisdiction over the property should continue. The language of the order is that "this order shall be without prejudice to the right of persons interested to move for the appointment of a receiver of the property of said defendant railway company," etc. The court could, therefore, by the very terms of this reservation, grant relief in a proper case to parties having a right to participate in the fund, even by the extreme measure of appointing a receiver of the whole railroad property.

In *Re Howard*, *supra*, the supreme court decided that even after a decree for a distribution of the fund to certain parties then before the court had been affirmed in the supreme court, and a mandate sent to the circuit court to execute the decree, the circuit court might open the case and allow other creditors to participate in the fund, and that this power continued up to the moment of the final distribution.

It is clear, therefore, that the court is not bound by the foregoing order to restrict its relief to the classes of creditors designated in the decree. Even if the court had made a decree giving the fund to particular parties by name, instead of merely designating them by classes, it would be entirely competent to modify the order so as to let in the claims of other creditors entitled to participate in the fund.

It being, then, unquestionable that the jurisdiction of the court continues in full force over both the 30 per cent. fund and the general property of the defendant company as trust funds for the payment of debts, the real and only question is whether or not the claims of the present intervenors are such as the court can, upon principles of equity, establish as liens upon the fund paramount to the lien of the bondholders. There can certainly be no doubt as to the right of these claimants to satisfaction out of the trust property as against the Missouri, Iowa & Nebraska Company and the Wabash Company, both of

which are bound by contract to pay all the floating debts of the Missouri, Iowa & Nebraska Company. But perhaps the real question to be solved is not between the present intervenors and the two railway companies, but between the intervenors claiming satisfaction out of the mortgaged property, and the mortgage creditors having liens upon the same. It may, indeed, be questioned whether the bondholders had any lien upon the 30 per cent. rental until the Wabash Company made default in the payment of interest upon their bonds, and the bondholders caused the railway property to be taken possession of by a receiver of the court. See *Gilman v. Illinois & M. Tel. Co.* 91 U. S. 608. In this case certain creditors of the railway company, between the decree of foreclosure and the sale, no receiver being appointed, garnished the receipts of the railway company in the hands of its operating agents. The supreme court of the United States sustained the action of the creditors upon the ground that the lien of the mortgage did not attach to the income of the road in the hands of the railway company without the appointment of a receiver to take possession of the road and property. But, however this may be, it is perfectly clear that the bondholders had no lien whatever upon the 30 per cent. rental fund until the Wabash Company made default in the payment of their interest upon the bonds of that road.

The semi-annual interest was, as we understand, paid by the Wabash up to March, 1884, and there can be no further default till September, 1884. To whom, then, in the intervening time between the issuing of the Wabash bonds and their default in the payment of the semi-annual interest, did the 30 per cent. belong? The Wabash Company was bound to pay the interest on their bonds, and it seems they did pay till March, 1884, without respect to the earnings of the road. Whether these earnings were great or insignificant, the interest had to be paid, and it *was* paid. The Wabash had a right, after paying the interest, to appropriate to its own use so much of the 30 per cent. gross earnings as might be necessary to reimburse itself. The balance, belonged of right to the defendant railroad company. Hence, the 30 per cent. fund was, during the intervening time mentioned, the property of the two railroad companies, and certainly the bondholders who received full payment of their semi-annual interest had no lien upon it whatever. One of the necessary results, indeed, of the consent order of October, 1880, was that the Wabash Company should pay the semi-annual interest to the bondholders out of its general assets, and that it should not apply the 30 per cent. rental to that purpose, for by the order of the court that fund was to be paid to the receiver for the benefit of floating creditors. To this the bondholders gave their consent, and they must have agreed to look exclusively, for the time being, to the Wabash Company, irrespective of the 30 per cent. fund, for payment. It follows that the bondholders had no lien or claim whatever on the 30 per cent. fund until, by the order of the court, the Wabash should cease to pay it to the re-

ceiver; the order providing, in express terms, that said payments should commence on the fifteenth day of November, 1880, and include the earnings thereof for the month of October, 1880, and so to continue from month to month until otherwise ordered by the court. Hence, all creditors holding claims for which both companies were bound, had a right to subject this 30 per cent. fund, in any lawful manner, to the payment of their debts, without any prejudice whatever to the lien of the mortgage, for none existed; the bondholders having received their interest, and the principal not yet being due. And this 30 per cent. fund being, by the consent order of October, 1880, in the hands of the court, through its receiver, no party, except the two debtor railroad companies,—both of which are bound, by contract, to pay the floating debts of the Missouri, Iowa & Nebraska Company,—has any right whatever to object to its application by the court to the payment of those debts.

But independent of this view, which seems to me conclusive, so far as the 30 per cent. fund is concerned, it is well-settled that there are floating claims, having no semblance of a legal lien, which may be established as equitable liens upon the railway property, and made paramount to the lien of the mortgage. *Burnham v. Bowen*, 111 U. S. 776; S. C. 4 Sup. Ct. Rep. 675; *Fosdick v. Schall*, 99 U. S. 235, 252. The present claims, though they may not, perhaps do not, fall within the doctrine of these cases, have, nevertheless, in my judgment, an irresistible equity, under the peculiar circumstances of the case, to be established as against the lien of the mortgage creditors; because, in the *first* place, the bondholders, for their own interest, were parties to an arrangement by which the sale of the trust property was arrested, and the unsecured creditors deprived of their right to satisfaction out of the surplus which we may reasonably assume would have resulted from the sale; *second*, because, as a part of the same arrangement, the entire property of the defendant company was transferred to the Wabash Company, leaving the defendant company without any means whatever to pay its debts, and this with the consent of the bondholders, for their benefit, and with their co-operation; *third*, because the bondholders, by the same arrangement, received a new and ample security for their debts in the personal obligation of the Wabash Company, and agreed to surrender and exchange their Missouri, Iowa & Nebraska bonds for those of the Wabash Company.

It is not necessary, to the right of intervention to participate in a trust fund *in custodia legis*, that the intervenor should first obtain judgment at law, or that he should have any lien upon the fund. *Barton v. Barbour*, 104 U. S. 126.

The exceptions to the master's report are therefore overruled, and a decree will be entered establishing the liens of the intervenors in accordance with this opinion.

ALLAN v. GILLET, Ex'r.¹*(Circuit Court, W. D. Louisiana. March Term, 1884.)***FRAUD—EXECUTOR—PURCHASE OF MORTGAGED PROPERTY—RESULTING TRUST.**

An executor who negotiates a mortgage upon part of his decedent's estate, to provide funds for a child and devisee of such decedent, cannot afterwards purchase the mortgage land under foreclosure proceedings and hold it for himself. The quality of his estate therein will be a resulting trust for the benefit of the child for whom the mortgage was made.

Demurrer.

Brady & Ring, for complainant.

Ballenger, Mott & Terry, for defendant.

BOARMAN, J. The bill shows that Mrs. F. B. Allan, widow, a citizen of Kentucky, is a devisee under the will of James Morgan, who died in Texas in A. D. 1866, leaving an estate consisting almost entirely of many thousand acres of wild lands lying in various parts of the state; that Gillet, whom complainant now sues, though appointed, jointly with G. A. Ball, executor, took charge of, and alone administered, Morgan's succession. She complains that, being in necessitous circumstances, she repeatedly demanded of him her one-seventh interest in said estate; but that he, by unlawful, wrongful, and unnecessary delays in the management and settlement of the succession, made it impracticable for her to secure her said interest, or to make it available for the maintenance of herself and children; that, being denied by him any relief for seven years, she and her husband, who could not or did not contribute anything to her support, entreated and requested defendant to let her have her portion, or some part of it, or to arrange for her in some way so as to make the same available for her relief; that he refused then to sell the property, or any part of it, though under the will and law he had full power to sell the lands without any order or process of the court; but that, instead of selling the lands, he suggested that she and her husband could obtain money by mortgaging her said interest, then under his administration, and offered his assistance to negotiate a loan for her; that, acting under his suggestions and promises, she executed her note, with a mortgage on her said interest, payable six months after date, 1872, for \$1,200, which he had discounted for her; that when he suggested the mortgaging of her property, and offered to secure the loan, he knew her condition, her poverty, and her inability to pay the note at maturity, unless he made her interest in the succession, then in his hands as executor, available for that purpose, as he promised to do; that, believing that he would not allow a foreclosure of the mortgage, she gave the said note, which otherwise she would not have done; that she believed in and relied on his promises and

¹ We are indebted to Talbot Stillman, Esq., of the Monroe, Louisiana, bar, for this opinion.

intention to protect her interest until a short while after the negotiation of the note, when he informed her, unless she or husband paid the note at maturity, her interest would be sold under the mortgage.

Complainant further alleges that at the time the note became due the said executor had in his hands the proceeds of a sale or sales of a part of the lands made by him under the provisions of the will; that until he was forced by law, in 1877, he never made any showing or account to any one; that at the time of the sale he was the only person, likely, who knew the location or value of the lands, and that he never gave her any information as to their location or value; that in withholding this information he had, took, and exercised an undue advantage over her, and all other persons interested in the sale or purchase of the interest sold, which, she alleges, was bid in by him for much less than it was worth; that he should be held in equity to have purchased, not for himself, but for her; that she has in vain endeavored to exercise her lawful right of redeeming the same, and she now prays for equitable relief.

This statement of her complaint is a summary of the bill to which the demurrer is filed. There are other allegations which seem to be only illustrative of her demand for relief.

In considering the case presented in this summary, it appears, at the time of the sale, there had been no partition or settlement of any kind of the succession, and the title to all the property, except to that which may have been sold, remained just where it was at Morgan's death; that Gillet held the lands in indivision, for all persons interested, just as they came into his hands. Under this statement, did Gillet, as the executor, occupy such a relation to the particular property sold under the mortgage, or to the complainant, as to forbid him now to hold the interest of complainant?

In *Michoud v. Girod*, 4 How. 552, it was held that a purchase by an executor of the property of the testator is fraudulent and void, though the sale was at public auction, judicially ordered, and a fair price was paid; that a purchase by a trustee of a particular property of which he has the sale, or in which he represents another, or which he holds in a fiduciary way for another, carries fraud on the face of it; and Justice SWAYNE quotes with an emphatic approval the following rule in equity from Sir EDWARD SUGDEN's chapter on "Purchases by Trustees, Agents," etc.:

"It may be laid down as a general proposition that trustees, * * * agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves. * * * For if such persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the persons relying on their integrity. The characters are inconsistent."

This rule in equity is not denied by defendant's counsel. They contend that the thing sold was not the testator's property; that it was only a right to a part of an estate, and it was sold at no instance of Gillet's, but for a debt incurred of her own choice and will; that he occupied no relations to her, or to the property sold, that forbade him to purchase it for himself; that he was not her guardian to protect her against improvident acts. Does this rule, declaring, as it admittedly does, that trustees, agents, and all persons holding confidential relations to another are included in that part of the rule italicized, apply to Gillet? The thing upon which the loan negotiated by him was secured, was a seventh part of the many thousand acres of land which he, at the time of the mortgage and sale, held for the testator's representatives, and of which he had, in consequence of his being the sole manager and administrator of Morgan's estate for many years, acquired a knowledge of the location and value of the lands which, likely, no one else could have possessed, and which, it would seem, he should not in fair dealing, under all the circumstances shown in the bill, have used, except for the benefit of all persons with whom he (as executor or otherwise) occupied any special or general fiduciary relations. It is not at all clear to me that the force of the rule invoked in this case can be broken or lessened, because, as is suggested, the sale at which he purchased the particular property was made to satisfy a debt against the property which she had incurred, instead of being made to satisfy a debt against the succession; for the fact that she, instead of the testator, incurred the debt, did not take the thing sold out of the executor's hands; nor did the fact that she mortgaged her interest in the succession sever their relations, or make the particular property sold the property of a stranger or third person, so far as Gillet was concerned.

It is further suggested in the argument that there was nothing to prohibit the executor from purchasing the interest of Mrs. Allen, she being *sui juris*, for himself; and as the sale was made by or for herself, to satisfy a creditor of hers, there is nothing in the rule to forbid the purchase Gillet made. That he could have purchased from her her part of the succession is true; but it has been uniformly held that where a trustee directly or indirectly purchases of his *cestui que trust sui juris*, it must appear that it was deliberately agreed or understood between them that the relation shall be considered as dissolved, and "that there is a clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, and it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, concealment, and no advantage taken by the trustee of information acquired by him as trustee." *Church v. Marine Ins. Co.* 1 Mason, 341. As the bill shows just the opposite of these fair conditions, it is not necessary to discuss the suggestion as to the competency of an executor to purchase of the *cestui que trust sui juris*.

It will be observed in this case that the complainant does not rest her demand for equitable relief solely upon the fact that Gillet, in his position as executor, was forbidden to purchase her property for himself, for the bill makes certain charges and complaints in relation to the advice, acts, transactions, and promises of Gillet in managing the estate and in negotiating the loan, which show, aside from his being the executor of the estate, that he was, or may have been, connected with her, and with her said interest, and with the debt for which it was sold, in such a fiduciary or confidential way as to forbid him to purchase for himself. It will be seen that the rule we are considering, and the public policy which its enforcement is intended to conserve, is not limited to prohibiting an executor, trustee, or agent from combining the dual character of vendor and vendee, as Gillet would certainly have done if he had purchased the whole or any part of his testator's property at a sale, judicial or otherwise, made to pay Morgan's debts, or to effect a partition of the lands. To prohibit this combination of inconsistent characters in an agent, is clearly one of the essential purposes of the rule in equity, and of the policy of the law as laid down in *Davoue v. Fanning*, 2 Johns. Ch. 252, and in the cases reviewed by the learned judge in his examination of that noted case; but it goes further, and makes it inequitable, under the allegations of complainant's bill, for Gillet, not considering his capacity as executor, to hold the property herein involved otherwise than as a resulting trust for the beneficiary now suing for equitable relief.

Demurrer overruled.

GOODYEAR RUBBER Co. v. GOODYEAR'S RUBBER Mfg. Co. and others.

(Circuit Court, S. D. New York. August 15, 1884.)

1. TRADE-NAME—RIGHT OF CORPORATION TO ACQUIRE—INFRINGEMENT BY ANOTHER CORPORATION.

A corporation may acquire a property right to the use of a name other than its original corporate name as a trade-mark, or as incidental to the good-will of a business, as well as an individual; and if it has acquired such a right, it cannot be deprived thereof by the assumption of such name subsequently by another corporation, whether the latter selects its name by the act of corporators who organize under the general laws of the state, or the name is selected for it in a special act by a legislative body.

2. SAME—PRIORITY—EVIDENCE—INJUNCTION—"GOODYEAR RUBBER COMPANY"—"GOODYEAR'S RUBBER MFG. Co."

Upon examination of the evidence in case at bar, *held*, that the "Goodyear Rubber Company" was entitled to an injunction restraining the defendant from using the name, "Goodyear's Rubber Mfg. Co."

In Equity.

W. W. MacFarland, for complainant.

F. H. Betts and Stephen P. Kellogg, for defendants.

WALLACE, J. The complainant is a corporation organized under the laws of New York, in 1872, by its present corporate name. The defendant is a corporation organized under the laws of Connecticut, in 1847, by its present corporate name. Each corporation seeks to enjoin the other, the complainant by bill and the defendant by cross-bill, from using the name "Goodyear's Rubber Mfg. Co." Both parties concede this name to be practically identical with complainant's name. The parties are competitors in the manufacture and sale of rubber goods, and have their principal places of business in the city of New York. Each insists that it has acquired the right to the use of the name in dispute, and that such name has become a valuable adjunct of its business; and each insists that the other has endeavored and is now attempting, by a wrongful use and appropriation of the name, to divert the custom of the other. As each party concedes that the right to use the name for the purposes of its business is a valuable property right, and asserts that such use by the other, is vexatious, embarrassing, and necessarily tends to pecuniary injury, the controversy manifestly resolves itself mainly into a question of title to the name. It is incumbent upon one of the parties to establish a lawful right to use the name as against the other, and the party which does this will be entitled to the relief prayed for.

The name of a corporation has been said to be the "knot of its combination," without which it cannot perform its corporate functions. Smith, Merc. Law, 133. It has neither the right nor the power to change the corporate name originally selected without recourse to such formal proceedings for the purpose as may be authorized by the laws under which it has been incorporated, or by the consent of the authority from which its charter is derived. Nevertheless, it may become known by another name by usage; and the courts have frequently treated acts done and contracts entered into by corporations under another name, as though done or entered into by it with the true name. *Minot v. Curtis*, 7 Mass. 441; *South School-dist. v. Blakeslee*, 13 Conn. 227; *Eastham v. Blackburn Ry. Co.* 23 Law J. Exch. (N. S.) 199; *Boisgerard v. N. Y. Banking Co.* 2 Sandf. Ch. 23. There is no reason why a corporation may not acquire a property right to the use of another name as a trade-mark, or as incidental to the good-will of a business, as well as an individual; and, if it has acquired such a right, it will of course be protected in its enjoyment to the same extent as an individual would be. It cannot be deprived of the right by the assumption of the name subsequently by another corporation, and it is immaterial whether the latter selects its name by the act of corporations who organize under the general laws of a state, or whether the name is selected for it in a special act by the legislative body. Manifestly, if the defendant had no right to use the name by which the complainant was incorporated, or one practically identical with it, at the time of the latter's incorporation, the title of the complainant is

clear, because it adopted the name formally, publicly, and legitimately, for all its corporate purposes. The defendant insists that it had acquired a prior right to the use of the name; that this right took its origin as early as 1862, and by a gradual process of development had ripened into a good title before complainant was incorporated.

Neither party makes any claim of exclusive right to use the word "Goodyear" alone, that word having become a generic term of description applied to a large class of India-rubber fabrics before either party became a corporation, or to the word "Goodyear" in combination with "rubber." There were trading concerns called the "Goodyear Metallic Shoe Co.," "The Goodyear Rubber Works," and the "Goodyear Rubber Emporium," before either party claimed the right to the name in controversy.

The defendant's theory, as sustained by the proofs, is that, beginning in 1862, when it ceased to confine itself to the manufacture of gloves, and engaged in manufacturing and selling rubber goods generally, its customers occasionally addressed it in their correspondence by various abbreviated names, such as "Goodyear's Rubber Mfg. Co.," "Goodyear Rubber Co.," "Goodyear's Co.," "Goodyear's I. R. Company," "Goodyear Company," and other abbreviations; that the use of such abbreviated addresses by its customers gradually increased, so that in 1871 the defendant received nearly 200 letters addressed to the Goodyear Rubber Company, and nearly 100 to the Goodyear Rubber Mfg. Co. On the other hand, the proofs show that during this time the defendant received many thousands of letters yearly; that the letters addressed to it by other names were comparatively a small number, averaging not over 500 a year, but embraced upwards of 70 varieties of names; and that its correct corporate name was usually adopted by its correspondents and patrons.

It is not claimed that the officers or agents of the defendant were accustomed during any part of this period to use any other than its corporate name, or assumed the right to do so until after the complainant commenced business. To the contrary, they were solicitous and painstaking to correct the tendency of its customers to address it by any other than its corporate name; and it was their practice to send envelopes to customers with its correct name printed upon them, to prevent the occurrence of such mistakes. Concisely stated, the question would seem to be, whether the defendant can appropriate to itself the various misnomers applied to it by the carelessness or inaccuracy of a comparatively small number of its customers during a period of 10 or 11 years, notwithstanding the zealous and active measures of its managers to repress the practice, and their success in preventing it from ripening into a general usage.

It would hardly be contended that an individual could found a claim of possessory right to any species of property upon the unauthorized conduct of other persons, or maintain that he had adopted a name symbolizing his products, or identifying his personalty with

his business, by protesting against its use; and of course a corporation does not occupy a different position. The proofs show that there was no general recognition of the defendant among its customers by any other than its corporate name, and no adoption by the defendant of a different name, and it must be held that the occasional or persistent use of the misnomer by a few of the defendant's customers gave no privilege to the defendant to a monopoly in the use of the name.

If the proofs warranted the inference that the complainant assumed a name by which the defendant was known for the fraudulent purpose of deceiving the public, and of supplanting the defendant in the good-will of its business, the court would not only refuse to assist the complainant, but would intervene to protect the defendant. A careful reading of the proofs fails to disclose the existence of any such design, or of any intention to adopt a name with which the defendant had already become appreciably identified. The case is destitute of evidence to indicate that the complainant's corporators were aware or had reason to suppose that the defendant had become known to any extent by any other name than its corporate name. So far as appears, they had no knowledge that defendant's customers ever addressed it by other names. Nor is there anything in the proofs to justify the insinuation that the complainant was organized for the purpose of annoying the defendant by illegitimate competition. It does appear that the persons who organized the complainant had been the managers and agents of another corporation, the Rubber Clothing Company, which for many years had been a competitor of the defendant at the city of New York; that propositions for a consolidation of this company with the defendant had been somewhat discussed between their respective managers without result; and that shortly afterwards the complainant was organized. For a time its affairs were transacted at the office of the Rubber Clothing Company, and the two concerns maintained very intimate relations, as might be expected from the circumstance that the managers were the same persons in both. But the salient facts that the new corporation started with a cash capital of \$500,000 and engaged in new branches of trade while the old company continued in business, sufficiently refute any theory that complainant was not a *bona fide* concern. If it should be conceded that the two concerns were practically one, and that the main object of the complainant's organization was to enable the Rubber Clothing Company to assume a new name,—one which would represent a corporation dealing in rubber articles generally, instead of in clothing only,—there would be no occasion for censure because the new name was better adapted to describe the business of the corporation. The Rubber Clothing Company had long ceased to manufacture and sell clothing only, and had become engaged in selling rubber goods generally. It was undoubtedly intended by those who organized the new concern to engage in the general rubber trade

upon a more extensive scale than that of the old company. The name selected was an appropriate one, and those who adopted it had a perfect right to do so, provided they did not know or have reason to believe that by doing so they would interfere with the business of the defendant. The fact seems to be that both the Rubber Clothing Company and the defendant were doing business under names that were somewhat misleading to such persons as had not learned, by business intercourse with them, that they were manufacturers and dealers in rubber goods generally. It would have been entirely proper for either of them to adopt a new name. The complainant adopted a new name first, and if it was only the Rubber Clothing Company with a new name, the defendant had no right to complain so long as the name did not serve to engender unfair competition and deceive the trade. As has been said, however, it was a new concern with a large capital, and contemplating enlarged business operations, and the proofs do not show that its incorporators were moved to select its name by any illicit motive towards the defendant. If the name selected was one calculated, by its similarity to defendant's name, to lead to confusion of business, and to confounding the identity of the two corporations, it might well be urged that those who adopted it should abide by the consequences, although they were innocent in their intentions, and not ask a court of equity to protect them against the inconveniences which might follow. But the defendant, not content that the consequences shall rest where they fall, insists upon the exclusive right to use the name, and since the complainant assumed it has issued notices and circulars to the trade, and put up a sign calling itself by the complainant's name. Upon the same theory it can also claim the exclusive right to use the multitude of misnomers applied to it from time to time by its careless customers. It has a distinctive name of its own, which it formally adopted, and which has been carefully preserved by its agents until the complainant selected one. It ought not to complain now because the latter was the first to avail itself of the choice of selection out of all unappropriated names. Certainly, it cannot be permitted to appropriate the complainant's name, or one substantially identical, and, by asserting itself as the Goodyear Rubber Company, mislead the public to the detriment of the complainant.

A decree is ordered for complainant, and the cross-bill of the defendant is dismissed.

LUTTIES and others v. HOLLENDER and others.

(Circuit Court, S. D. New York. August 9, 1884.)

TRADE-MARKS—STATE LAWS.

The rights and remedies concerning trade-marks generally depend upon the laws of the states, common or statutory, and not upon the laws of the United States.

In Equity.

Samuel T. Smith, for orators.

Louis C. Raegener, for defendants.

WHEELER, J. Rights and remedies pertaining to trade-marks generally depend upon the laws of the state, common and statutory, and not upon the laws of the United States. *Trade-mark Cases*, 100 U. S. 82. The laws of the United States now in force, under which this trade-mark was registered, relate only to trade-marks specially used in commerce with foreign nations, or with the Indian tribes. Act of March 3, 1881, (21 St. at Large, c. 137, § 1.) They are particularly restricted so as not to give cognizance to any court of the United States in an action or suit between citizens of the same state, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe. *Id.* § 11. The goods on which the trade-mark in question is used are not intended to be transported to any foreign country, nor for any Indian tribe, but are mineral waters sold for consumption in the city of New York; and the parties are all citizens of the state of New York.

As this case is now presented, the orators are not entitled to maintain it in this court, and this motion for a preliminary injunction must be denied.

CONNECTICUT MUTUAL LIFE INS. CO. v. CRAWFORD and others.

(Circuit Court, N. D. Illinois. August 8, 1884.)

1. MORTGAGE—MORTGAGEE NON-RESIDENT—UNITED STATES CIRCUIT COURT—DECREE.

A mortgagee, resident in a state other than that of the mortgagor, may file his bill for foreclosure in the United States circuit court, and obtain a decree, upon case shown.

2. SAME—REDEMPTION BY JUDGMENT CREDITOR—RULES OF COURT.

A judgment creditor may redeem premises from a sale under judgment or decree of a United States court by suing out execution upon his judgment in the ordinary manner, placing his execution in the hands of the proper officer to execute, and paying the money needed to redeem in the hands of the clerk of the United States court, together with the commissions of the clerk for receiving and paying the money.

3. SAME—PAYMENT OF MONEY TO SHERIFF.

Under the system of the United States court, payment of money into the hands of the sheriff is no redemption of premises sold under decree of foreclosure passed by that court, when the United States court has, by its rules, provided that the redemption money shall be paid to its clerk.

In Equity.

Isham, Lincoln, Burry & Ryerson, for complainant.

C. M. Osborn, for defendant.

BLODGETT, J. The bill in this case seeks to set aside a sheriff's deed as a cloud upon complainant's title, and the defendant demurs to the bill. The main facts alleged in the bill are briefly these: Complainant held a mortgage against W. H. W. Cushman, and filed a bill to foreclose it in this court, and obtained a decree. A large number of lots were included in the mortgage, which were sold separately, separate bids being made on each lot. The sale was reported to the court by the master, and confirmed, and none of the defendants redeemed from the sale during the 12 months succeeding the sale, but after that time, and before the expiration of 15 months, Crawford, who had obtained a judgment against the original mortgagor in the state court, sued out an execution upon his judgment, placed it in the hands of the sheriff of Cook county, and directed a levy to be made upon a portion of the lots sold under this decree. He then proceeded to pay to the sheriff the money requisite to redeem the lots now in question (being only a portion of those sold under the decree) from the sale, and had the usual advertisement and sale made that the statutes provide for the purpose of consummating the redemption, and at the proper time received a sheriff's deed. The money for the purpose of redemption was never paid to the clerk of this court, nor tendered to the complainant.

There being no notice brought home to the court, in any form, that these premises had been redeemed in pursuance of the rules and practice of this court, the complainant became entitled to a deed from the master, in the due course of time, for all the lots sold under its decree, and now claims under its decree of foreclosure and the sale. The defendants claim title under the alleged redemption by Crawford.

In July, 1878, long prior to the proceedings in question, this court adopted certain rules for regulating the redemption from sales in this court, in cases where redemption is allowed by the statute of the state of Illinois. These rules were adopted in accordance with the suggestion made by the supreme court of the United States in *Brine v. Ins. Co.* 96 U. S. 627, and they have since been confirmed in the case of the *Connecticut Mutual Life Ins. Co. v. Cushman*, 108 U. S. 56; S. C. 2 Sup. Ct. Rep. 236; and the court there holds, in substance, that it is not only within the power, but it is the duty, of the federal court, when rights are given by a state statute, to adjust the practice of the court by its rules, so as to secure and protect the

property rights given by the statute. In the same case it is also held that the rules adopted by this court were within the scope and power of the court, and such as it was not only the right but the duty of the court to adopt. This court, by the rules of 1878, provided that redemption should be made by a judgment creditor from a sale under a judgment or decree of this court, by the creditor suing out his execution in the ordinary manner on his judgment, placing his execution in the hands of the proper officer to execute, and paying the money needed to redeem into the hands of the clerk of this court, together with the commissions of the clerk for receiving and paying out the money. The redeeming creditor in this case ignored these rules, and undertook to make a redemption by paying his money to an officer not known to this court, and not within its control, and with whom the court had no relations whatever, and with whom, it seems to me, it is not in the power of the redeeming or judgment creditor to bring the complainant or this court into relations. The complainant, being a non-resident corporation, had the right to seek this forum as the one through which it would enforce its lien on these lots, and was not obliged to look to any state court or its officers for the purpose of obtaining the money, after this court had made rules of procedure.

I am therefore of opinion that, upon the showing made by this bill, the redemption was totally void, and that the demurrer to the bill should be overruled.

REED v. ATLANTIC & P. R. Co.

(Circuit Court, S. D. New York. August 26, 1884.)

DECISION OF COURT OF CO-ORDINATE JURISDICTION—ATLANTIC & PACIFIC RAILWAY COMPANY—RIGHT TO DIVIDENDS.

As it has been decided by a court of co-ordinate jurisdiction, in an action brought by the Pacific Railroad (of Missouri) to recover, among other things, the dividends agreed to be paid to its stockholders by the defendant in the lease between the two corporations, that the right of action for the dividends is in the corporation and not in the individual stockholders, this court, in a suit upon the same lease, brought by one of the stockholders to recover part of the same dividends, follows that decision, and judgment for defendant is ordered.

At Law.

E. L. Andrews, for plaintiff.

Geo. Zabriskie and *John E. Burrill*, for defendant.

WALLACE, J. It has been decided by a court of co-ordinate jurisdiction, in an action brought by the Pacific Railroad (of Missouri) to recover, among other things, the dividends agreed to be paid to its stockholders by the defendant in the lease between the two corporations, that the right of action for the dividends is in the corporation and not in the individual stockholders. It would be unseemly for this

court, in a suit upon the same lease brought by one of the stockholders to recover part of the same dividends, to hold the contrary. Such a decision might result in two judgments against the defendant for the same dividends. Under such circumstances, as was well said in *Goodyear Dental Vulcanite Co. v. Willis*, 1 Ban. & A. 573: "Every suggestion of propriety and fit public action demands" that the decision made "be followed until modified by the appellate court."

Judgment is ordered for defendant.

ROGERS and others v. BOWERMAN.

(Circuit Court, S. D. New York. August 22, 1884.)

PRACTICE AND PROCEDURE—REMITTING PART OF VERDICT—WHEN ALLOWED—
RIGHT OF APPEAL.

A trial court, in a meritorious case, will not allow a plaintiff to remit a part of the amount for which a verdict has been rendered, when such reduction will deprive the defendant of an opportunity to have the decision reviewed in an appellate court.

At Law.

Wheeler & Souther, for complainants.

WALLACE, J. The plaintiffs ask leave to remit part of the amount for which the verdict in this case, by direction of the court, was rendered in their favor. The result, if such a reduction of the judgment to be entered is permitted, would be to reduce the judgment below the sum of \$5,000, and thereby preclude the defendants from a review by writ of error to the supreme court. Undoubtedly, it is competent for the trial court, in the exercise of judicial discretion, to allow such a reduction to be made; but such a discretion should be very carefully and sparingly exercised. Certainly, this is not a case where the court should willingly deprive the defendants of an opportunity to review the decision. As is said in *Thompson v. Butler*, 95 U. S. 694, 696, "if the object of the reduction is to deprive an appellate court of jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done." It is far from clear that the plaintiffs were entitled to recover, and a verdict was directed for them with grave doubt as to the correctness of the conclusions reached by the court. It is a peculiarly meritorious case for the consideration of the appellate court.

The motion of the plaintiffs is denied.

UNITED STATES v. BENJAMIN.

(Circuit Court, D. California. August 18, 1884.)

PUBLIC LANDS—CUTTING TIMBER ON MINERAL LANDS IN CALIFORNIA—ACT OF JUNE 3, 1878, CHS. 150, 151.

Timber upon mineral lands in the state of California is protected and governed by the provisions of the act of June 3, 1878, c. 151, (20 St. at Large, 89,) made specifically applicable to that state, and not by the general provisions of chapter 150 of the act of June 3, 1878, (20 St. at Large, 88,) which can only operate upon "mineral districts," if any there be, not specifically provided for by designating the particular state or territory in which it is situated by name.

Demurrer to special answer, and motion to strike out a portion as immaterial.

S. G. Hilborn, U. S. Atty., for plaintiff.

Geo. G. Blanchard, for defendant.

SAWYER, J. The United States bring this action to recover the value of lumber alleged to have been manufactured from timber trees unlawfully cut on the public lands. The defendant, as a justification, specially answers that the trees from which the lumber in question was manufactured grew and were cut "in a mineral district of the United States," known as such throughout the state, and so recognized by the customs of miners and the decisions of the courts, and designated "The Georgetown Mineral and Mining District," being "in the mineral belt of said state of California and county of El Dorado;" that defendant was and is a citizen of the United States, and a *bona fide* resident of said "Georgetown Mineral District;" that the land on which said trees grew was public land of the United States, mineral in character, and not subject to entry under existing laws of the United States, except as mineral lands; that the lumber "was used in said mineral district and adjoining mineral districts of said county of El Dorado for building, agricultural, mining, and other domestic purposes, but principally for mining purposes; that said timber was felled, removed, and used for the said purposes, * * * in accordance with the rules and regulations prescribed by the secretary of the interior;" and that said timber "was felled and removed, and said acts committed, under a license from the United States, under and by virtue of an act approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and other territories to fell and remove timber on the public domain for mining and domestic purposes."

The act under which defendant attempts to justify, provides—

"That all citizens of the United States, and other persons *bona fide* residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber, or other trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws

of the United States, except for mineral entry in either of said states, territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber, and of the undergrowth growing upon such lands, and for other purposes."

The United States attorney insists that this act is not applicable to the state of California, and, consequently, it can afford no justification of the acts complained of. The defendant, on the other hand, contends that the words "all other mineral districts of the United States" embrace every "mining district," recognized as such by the customs of miners of the locality embracing it, in whatever state or territory it may be situated. A similar question arose in the circuit court for the district of Oregon in *U. S. v. Smith*, in which DEADY, J., after a full and careful consideration of the question, held that the act did not apply to the state of Oregon. *U. S. v. Smith*, 8 Sawy. 101; S. C. 11 FED. REP. 487. If it does not apply to Oregon, for similar reasons it is inapplicable to California.

After a careful consideration of the question I am constrained to concur in the conclusion reached by the district judge of Oregon, and hold the provision to be inapplicable to California.

If this act stood alone, the position taken by the defendant's counsel would not be without plausibility. But, unfortunately for him, it does not stand alone. On the same day another act was passed, specifically applicable to timber lands in the states of California, Oregon, Nevada and Washington Territory, which contains provisions wholly inconsistent with the provisions relied on in the act relating specifically to Colorado and the territories therein named. It does not appear which act was, in fact, first passed, but probably it was the first-mentioned act relating to Colorado, etc., as that is designated in the statutes as chapter 150, while the act relating to California, etc., is numbered chapter 151 of the Statutes. See 20 St. 88, 89. If the latter act is to be treated as a subsequent statute, it repeals the inconsistent provisions of the prior act, as it expressly provides that "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." Section 6. But the most favorable view for the defendant is to regard the two statutes, as they were both passed on the same day, as constituting but one statute, the former part of the act making specific provisions for Colorado, and the other states and territories named; and the subsequent provisions of the act making like specific provisions for California and the other state and territories therein named. So viewing the statute, we must, if possible, construe all the provisions in such manner that every part can stand and have effect.

In such cases, also, loose general provisions of doubtful import in the former part of the statute must yield to subsequent clear and specific provisions, which are so explicit as to admit of but one construction. The clause, "all other mineral districts of the United

States," in the first-named act, as shown by DEADY, J., in the case already cited, is very general and exceedingly indefinite and uncertain as to its application; while the provisions of the other act are made *specifically* applicable to the state of California by terms so clear and explicit as not to be open to any other construction. The most that can be said of the general clause is that it can only refer to "all other mineral districts of the United States" not otherwise specifically pointed out by other provisions of the act,—the two acts being regarded as one. But California is otherwise specifically provided for. In my judgment the timber upon the public lands in the state of California is protected and governed by the provisions of the second act, made specifically applicable to California, and not by the loose *general* provision of the first act, which can only operate upon "mineral districts," if any there be, not specifically provided for, by designating the particular state or territory in which it is situated by name.

To hold otherwise would be to make the specific and certain yield to the general, indefinite, and uncertain, which would be contrary to the well-established canons of statutory construction. The second act expressly provides "that after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, *any timber growing on any lands of the United States in said states and territories,*" of which California is the first specifically named in the act: "provided, that nothing herein contained shall prevent any *miner or agriculturist* from clearing *his land in the ordinary working of his mining claim*, or preparing his farm for tillage, or from taking the timber necessary to support his improvements." Thus it will be seen that the right to cut timber is much more restricted as applied to the states and territory named in this act than the right conferred on the residents of the states and territories named in the other act. In this act the right is limited strictly to the *miner and agriculturist*, and is restricted to cutting timber on *his own mining claim or farm*, and to the purpose of clearing the land in the "ordinary working of his mining claim," or "preparing his farm for tillage," and to "taking the timber necessary to support *his* improvements." The part of the answer in question does not show defendant to be either a miner or farmer, or that he cut the timber on his own mining or farming claim, or that he did it for any of the designated purposes. Indeed, he does not attempt to bring himself within the provisions of this act relating specifically to California, but he relies wholly on the other act, which specifically relates to Colorado, and the other territories and districts therein named, in general indefinite terms, which latter act is much more liberal in its provisions than the other.

It follows that the facts alleged are insufficient to constitute a defense, and, if true, are wholly immaterial.

The demurrer must be sustained, and the motion to strike out granted; and it is so ordered.

GRAY and others v. QUICKSILVER MINING Co.

(Circuit Court, D. California. August 18, 1884.)

JURISDICTION OF CIRCUIT COURT—SUIT AGAINST FOREIGN CORPORATION—WHERE BROUGHT—ACT OF 1875, § 1—WAIVER OF EXEMPTION—APPOINTMENT OF AGENT, UPON WHOM PROCESS MAY BE SERVED.

The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, which he may waive; and when a foreign corporation, in pursuance of the laws of a state in which it carries on business, designates a person upon whom process may be served, it thereby consents to be sued in the district embracing such state, and waives the exemption granted to it under the act of congress.

Motion to Quash Service of Subpœna.

Wm. Matthews, for motion.

L. D. Latimer, *contra*.

SAWYER, J. The defendant is a corporation organized and existing under the laws of New York, working a quicksilver mine in Santa Clara county, California. A statute of California, passed in 1872, (St. Cal. 1871-72, p. 826,) requires every corporation created by the laws of any other state, doing business in this state, "to designate some person residing in the county in which the principal place of business of said corporation in this state is, upon whom process may be served, * * * and file such designation with the secretary of state. * * * And it shall be lawful to serve on such person so designated any process issued as aforesaid," etc. Foreign corporations complying with this provision enjoy certain specified advantages, and those not complying are subjected to certain prescribed disabilities. In pursuance of the provisions of said statute of California, the defendant, on July 18, 1872, filed in the office of the secretary of state of the state of California, a document under the seal of the corporation, and signed by its president and secretary, whereby "James B. Randall, who resides in New Almaden, Santa Clara county, in the state of California, being the county in which the principal place of business of said company is, as the person upon whom process issued * * * may be served." The subpœna in this case was served in due form upon said James B. Randall.

It is claimed on behalf of defendant that under the act of congress of 1875, relating to the jurisdiction of the United States courts, section 1, it is not liable to be sued in the United States circuit court for the district of California, or elsewhere in the national courts out of the state of New York. Said statute provides "that no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," etc.

It is insisted that a corporation, under the decisions of the United

States supreme court, can only be regarded as an inhabitant of the state under whose laws it derives and continues its existence, and, for similar reasons, that it cannot be found in any other state, and therefore it is not liable to be sued in any other state; and so it has been heretofore frequently held in this and other circuits, where there were no other facts or circumstances to affect the question. But the supreme court has directly held that this provision of the United States statute "is not one affecting the general jurisdiction of the courts. It is one rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive;" and that filing a designation of a person upon whom service may be made in another state, in pursuance of the laws of such state, requiring a party to be designated upon whom service of process may be made, is a waiver of its privilege, and constitutes a consent to be sued in such state. In *Ex parte Schollenberger*, 96 U. S. 377, 378, the supreme court says upon this subject:

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located, by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter, or excluded by local laws. Under such circumstances it seems clear that it may, for the purpose of securing business, consent to be 'found' away from home, for the purposes of a suit, as to matters growing out of its transactions. The act of congress prescribing the place where a person may be sued, is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the circuit court has jurisdiction of the causes, and should proceed to hear and decide them."

Similar views are announced in *Railroad Co. v. Harris*, 12 Wall. 65; *St. Clair v. Cox*, 106 U. S. 355-357; S. C. 1 Sup. Ct. Rep. 354; *N. E. Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 146; S. C. 4 Sup. Ct. Rep. 364. Like rulings have been made many times in the various circuit courts.

The defendant having designated a person upon whom process may be served in pursuance of the requirements of the statute of California, it has thereby consented to be sued in the district of California, and waived the exemption granted to it under the act of congress. The service was upon the person so designated by defendant, and is in all respects regular.

The motion to quash the service must be denied; and it is so ordered.

FRANKLIN INS. CO. v. SEARS.¹

(Circuit Court, S. D. Ohio, W. D. July 2, 1884.)

1. PRINCIPAL AND AGENT—INSURANCE—AGENT ORDERED TO CANCEL POLICY—DEFAULT OF SUBAGENT OR BROKER.

Where an insurance company had ordered S., its agent, to cancel a policy which he had written, the policy containing a stipulation for its cancellation, and a loss occurred to the company through the failure to have the policy canceled, in an action by the company against S., *held*, that S. was not relieved from liability by showing that he had directed the broker, who placed the insurance with him, to have the policy canceled. The broker, in procuring the cancellation, was the agent of S., and S. was responsible for the broker's default.

2. SAME—CUSTOM—BROKERS.

In such action it is incompetent, for the purpose of so relieving S. from liability, to prove a custom to procure the cancellation of policies through the broker placing the insurance with the company's agent.

3. SAME—CHARGE OF COURT—WHAT AMOUNTS TO NEGLIGENCE.

In such action it was not error to charge the jury that, if the broker called at the place of business of the insured and finding him absent made no inquiry whether any one present was authorized to receive for the insured the unearned premium, when in fact such a person was present, and there was no other step taken to effect a cancellation until a loss occurred, the broker was guilty of negligence, for which S., the defendant, was liable.

4. REASONABLE TIME—QUESTION OF LAW, WHEN.

What is a reasonable time, is always, where the facts are undisputed, a question exclusively for the court.

At Law.

Wilby & Wald, for plaintiff.

Burnet & Burnet, for defendant.

SAGE, J. The motion for a new trial is upon two grounds: *First*, that the court erred in refusing to permit the defendant to introduce testimony to prove a custom to procure the cancellation of a policy of insurance by the agency of the broker who placed the insurance with him,—a custom, the defendant offered to prove, of universal prevalence, not only at Cincinnati, where the policy which the defendant was ordered by the plaintiff to cancel was issued, and where the property insured was located, but also at Boston, the place of the home office of the plaintiff.

On the twenty-second of May, 1882, the defendant, then plaintiff's agent at Cincinnati, issued plaintiff's policy to the Central Oil Company, of which a Mr. Upson was sole proprietor, insuring certain oil works in the sum of \$750 against loss by fire. On the twenty-seventh of the same month the defendant wrote advising the plaintiff of the insurance. The letter was received at Boston on the twenty-ninth, and the plaintiff immediately mailed an order to the defendant to cancel the policy. That letter, it was admitted, was received by the defendant by due course of mail, which it was in

¹ Reported by J. C. Harper, Esq., of the Cincinnati bar.

evidence would bring it to Cincinnati on the first or second of June, and to the defendant, who received his mail by carriers' delivery, possibly on the first, probably on the morning of the second, and certainly not later than the morning of the third of June. On the day of his receipt of the order the defendant notified the broker, who, acting for Upson, had placed the insurance, and requested him to cancel the policy. The policy, which was for one year, at 5 per cent. premium, contained a provision for its cancellation at any time by payment to the assured of the unearned premium. The broker called at Upson's place of business, and learning that he was absent from the city and would return on the seventh, made no inquiry whether any one was authorized to represent him, and said nothing about the cancellation of the policy. There was present at Upson's place of business his representative, authorized to receive money for him in his absence. Within a day or two the defendant asked the broker if he had canceled the policy, and being answered in the negative, urged him to attend to it without delay. Nothing further was done until the morning of the seventh of June, when the defendant and the broker went to Upson's place of business and found him there, he having returned that morning, and found, also, the property insured in flames. The loss was total. The plaintiff settled with the assured by the payment of \$700. This action was brought to recover the same from the defendant.

None of the facts above stated were disputed at the trial, and they include substantially all that appeared in evidence.

When the defendant offered to introduce testimony tending to prove the custom to notify the broker to cancel the policy, no objections had been made to the selection of this broker for that purpose, and the plaintiff's counsel stated in the hearing of the court and jury that no such objection would be made. The court, therefore, ruled that the testimony was immaterial, and excluded it, but stated that it would be admitted if any objections were made to the employment of the broker. None were made. The court charged the jury that the defendant was not bound personally to cancel the policy, and that he had the right to direct the broker to cancel it. Unless the proof of the custom was to serve some other and additional purpose, the defendant lost nothing by its exclusion. But the defendant's claim is, in effect, that by notifying the broker to cancel the policy, and afterwards, when he learned that the broker had not canceled it, urging him to do so, he discharged his duty and freed himself from liability, and he depends upon the proof of the custom to sustain him in this claim. I do not think the proposition a sound one. The defendant was the plaintiff's agent. It was his duty to obey the order to cancel the policy. That was an obligation of his contract of agency. The broker was the agent of the assured; he was not the agent of the plaintiff. It is true that his agency for the assured terminated with the placing of the insurance. But all his interests

in this matter were with the assured. The custom to procure the cancellation of the policy by the agency of the broker, doubtless had its origin in the desire of insurance agents to retain the good-will of brokers with whom they had dealings. It is to the advantage of the broker to have the opportunity to substitute other insurance for a canceled policy, and thereby prevent the loss of his commissions or of the business of the assured, his principal. There is no objection to the insurance agent favoring the broker by giving him the conduct of the cancellation, provided the agent does not thereby sacrifice the interests of his principal, the insurance company. The broker naturally desires to keep alive the policy which the company has ordered to be canceled, until he can substitute another policy equally acceptable to the assured. It is not remarkable, therefore, that instances have occurred, as stated in one of the affidavits filed in support of the motion, where the broker has suffered more than a month to elapse after notification before canceling a policy. To hold that the agent of the insurance company, under instructions to cancel a policy, discharges his duty and frees himself from further responsibility by notifying the broker according to custom, and leaving the matter entirely in his hands, would be in direct conflict with the principle of the ruling in *Grace v. American Cent. Ins. Co.* 109 U. S. 278, S. C. 3 Sup. Ct. Rep. 207, that it is not competent to prove a custom that notice to the broker should operate to cancel a policy. The policy issued by the plaintiff stipulates that it may be canceled at any time by payment to the assured of the unearned premium. When the agent was directed to cancel the policy it became his duty to pursue the method printed out in the policy, and to do so promptly. He might do this personally, or through the broker who placed the insurance. If he chose to act through the broker, he made the broker his agent, and was responsible for such default as was clearly proven by the undisputed evidence upon the trial. I am satisfied, therefore, that there was no error in excluding the proof of the custom.

The second ground for the motion is that the court erred in charging the jury that the omission of the broker to inquire whether there was any person at the place of business of Upson, the assured, authorized to receive the unearned premium for him in his absence, was neglect imputable to defendant, and that the plaintiff was therefore entitled to a verdict. I am clear that the defendant is not entitled to a new trial on this ground. The defendant received his instructions to cancel the policy not later than the morning of the third of June; that is the latest date named in the testimony. He may have received them the morning of the first, probably did receive them not later than the morning of the second, of June. The defendant at once notified the broker. The broker called at the office of the assured, and, learning that he was absent from the city, made no reference to the cancellation of the policy, but, as he testified, left that to be attended to after Upson's return. No inquiry was made

whether any one was authorized to receive money for him in his absence, although his representative, with full authority, was present and conversed with the broker. The payment of the unearned premium was all that was necessary to cancel the policy. The insurance was upon property classed as extra-hazardous. No further effort was made to obey the instructions to cancel the policy until the morning of the 7th, and then the agent and the broker arrived on the ground when the property was on fire. The court charged the jury that it was the duty of the broker to make inquiry, and that if they found from the testimony that he failed to do so, there being, as was shown by the only testimony offered on that point, a person present authorized to receive the return premium, and it being in testimony and not controverted that no other steps were taken to cancel the policy, he was guilty of negligence for which the defendant was liable, and the plaintiff was entitled to a verdict.

The court did not undertake to determine what the facts were. That was left to the jury. The jury was instructed that if the facts were as above stated they amounted to negligence. This is in exact accordance with the ruling in *C., C. & C. R. R. v. Crawford*, 24 Ohio St. 631, where it was held that "if all the material facts touching the alleged negligence be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, the question of negligence becomes a matter of law merely, and the court should so charge the jury." This ruling is in harmony with the general current of authority upon the subject. There is another view which might have been taken had the statement of what the defendant expected to prove in reference to the custom been as broad when the ruling was made excluding the testimony as is presented in the affidavit upon this motion. At the trial the offer was to prove a custom authorizing the agent to employ the broker who placed the insurance to cancel the policy. The affidavits add that the agent would hesitate for some time, the length of time varying with the circumstances,—in some instances as long as several weeks,—before interfering with the broker in the cancellation of the policy. In so far as this feature of the custom may be construed as giving to the agent, or to the broker, the right to determine what is a reasonable time within which to cancel the policy, I think the custom is bad, and should not be recognized. On receipt of his instructions it becomes the duty of the agent to cancel the policy, or to have it canceled by the broker, within a reasonable time. The agent is justified in employing the broker, because of the urgency of the order and the multiplicity of his own engagements, to facilitate prompt cancellation, and not that the broker may exercise his discretion as to the time to cancel the policy, or delay it until he can procure another policy for the assured. What is a reasonable time is always, where the facts are clear, a question exclusively for the court. *Wiggins v. Burkham*, 10 Wall. 129. Upon the trial the facts were not disputed. The de-

lay was unreasonable, and giving to the testimony its greatest probative force in favor of the defendant, it was without sufficient excuse, and the court might therefore properly have directed a verdict for the plaintiff.

The defendant files also, in support of the motion, the affidavit of Upson that the authority given by him to his clerk to receive money in his absence was only to receive money in the ordinary course of business. On the trial, Upson being absent from the city, it was stipulated in writing that he would testify, if present, that his clerk had authority to receive money in his absence, and this was by consent read in evidence. If the defendant made a mistake and admitted too much, it is too late now to remedy it. Besides, the affidavit does not contradict the stipulation. It amounts only to Upson's construction of the authority, and even if it were so limited as he stated, I am inclined to the opinion, although the provision in the policy for cancellation is to be strictly construed, that the agent should at least have left with the clerk a certified check, payable to the order of Upson, for the amount of the unearned premium.

The verdict was for the amount paid by plaintiff on account of the loss, with interest. As the defendant in his settlement with the plaintiff did not retain the amount of the unearned premium, the amount thereof, with interest, should be remitted. Upon condition that this be done, the motion for new trial will be overruled.

ANDERSON and others v. FITZGERALD.

(Circuit Court, S. D. Iowa. March Term, 1884.)

CONTRACT—ACTION BY STRANGER—DEMURRER.

Defendant entered into a written contract with the Chicago, Burlington & Quincy Railway Company to construct a certain portion of its road, stipulating, among other things, that he "would pay all claims against him, or against any subcontractor under him, for services and labor performed or materials furnished in said work, and to pay, or cause to be paid, all claims growing out of said work, whether against him or any subcontractor under him, for trespass and injury to lands, * * * and all claims for provisions and supplies, and bills for board of men and teams engaged upon said work, and all similar claims; said damages to be estimated and paid as specified in the preceding clause," which provided that "the resident engineer should have the right to estimate the amount of such damages, and to pay the same to the owner or occupant of said property or land, deducting on his first estimate the amount paid from the value of the work done." Another clause provided that "in all cases the amount of claims for labor and material furnished to defendant should be deducted and retained by the company, and paid to the claimants, or held till such dues were paid or otherwise settled." Defendant sublet the work, and his contract with the subcontractor provided that he should have the same right to pay claims against the subcontractor which the railway company had reserved to itself. The subcontractor gave orders to plaintiffs for various sums to different parties, for supplies and labor, which they paid, and for the amount so paid they brought suit against defendant. *Held*, that the

rule that the party to be benefited by a contract not under seal may sue thereon, although the promise be not made to him, did not apply, and that plaintiffs were not entitled to recover.

At Law.

Baldwin & Wright, Smith McPherson, and McPherrin Bros., for plaintiffs.

Hepburn & Thummell, W. W. Morsman, and T. M. Marquett, for defendant.

LOVE, J. This case is before the court upon the defendant's demurrer to the petition.

It is alleged that the defendant entered into a contract in writing with the Chicago, Burlington & Quincy Railway Company to construct certain sections of the company's road in Page county, Iowa, stipulating among other things that the defendant "would pay all claims against him, or against any subcontractor under him, for services and labor performed or materials furnished in said work, and to pay or cause to be paid all claims growing out of said work, whether against him or any subcontractor under him, for trespass and injury to lands, burning fences, destruction of timber, use of lands for waste, and all claims for provisions and supplies, and bills for board of men and teams engaged upon said work, and all similar claims; said damage to be estimated and paid as specified in the preceding clause." In the "preceding clause" referred to it is provided that "if any damage should be done by the party of the first part, or men in his employ, to the lands or property in the vicinity of the work, the resident engineer shall have the right to estimate the amount of such damage, and to pay the same to the owner or occupant of said property or lands, deducting on his first estimate the amount paid from the value of the work done under the contract by said first party." It is further provided in another clause that "in all cases the amount of claims for labor and material furnished to the party of the first part may also be deducted and retained by the party of the second part and paid to such claimants, or he'd till such dues are paid or otherwise settled."

It is further alleged in the petition that Fitzgerald sublet the work, and in his agreement with the subcontractor it was provided that Fitzgerald should have substantially the same right to pay claims against the subcontractor which the railway company had reserved to themselves. It is further averred that Stout, the subcontractor, gave orders to the present plaintiffs, who were merchants, for various sums to many different parties for supplies and labor, and that the plaintiffs paid the same. The plaintiffs exhibit their account against Stout, amounting to \$2,692.57, made up of a large number of items ranging from one to fifty dollars, and consisting of supplies furnished upon Stout's orders to laborers on the work.

The plaintiff seeks to apply to this case the rule that "the party to be benefited by a contract not under seal may sue thereon, although

the promise be not made to him." 1 Chit. Pl. 5, (11th Amer. Ed.; 7th London Ed.) and cases cited; *Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Sailly v. Cleveland*, 10 Wend. 156; *McMenomy v. Ferrers*, 3 Johns. 71; *Lawrence v. Fox*, 20 N. Y. 268, and the review of the cases in the dissenting opinion. See, also, *Ball v. Newton*, 7 Cush. 599; *Arnold v. Lyman*, 17 Mass. 400; *Farlow v. Kemp*, 7 Blackf. 544. This rule is well settled, but if we consider the foundation upon which it rests we must, I think, conclude that it has but a limited application in our law; for no doctrines are better settled than that a stranger to a contract and to its consideration cannot ordinarily maintain an action upon the contract, and that one person cannot make himself the debtor of another without his consent, express or implied, by proposing to confer a benefit upon him. 1 Chit. Cont. (11th Amer. Ed.) 74, and cases cited; and especially the cases cited and commented on in note x, and *Farlow v. Kemp* and *Ball v. Newton*, *supra*. Consent lies at the basis of contracts. There must be consent, express or implied, to make any person a party to a contract. No man can be made a party to a contract merely because it confers upon him a benefit, how great soever it may be. The reason, therefore, of the rule above named must be that where one person for a valuable consideration agrees to pay the debt or discharge the obligation of his immediate promisee to a third person, the consent of such third person to the undertaking may be implied. It may well, indeed, be implied that any person will consent to that which confers a direct pecuniary benefit upon him, unless his dissent appears either by his express words or from the circumstances of the case. It will not be contended, I suppose, that if the party to be benefited by the promise made to a third person to pay money to him should once refuse his assent to the arrangement, he could afterwards maintain an action upon the contract.

Perhaps it would appear, by a close scrutiny of the cases, that the doctrine which the plaintiff relies on proceeds upon promises to pay a sum of money ascertained, or easily ascertainable, to some designated person. In such cases the consent of the party to be benefited may well be presumed, since men do not ordinarily reject clear and certain benefits, which in turn impose upon them no obligation. But where one person agrees with another to perform any uncertain, future, and contingent obligations, which may arise out of contemplated transactions between the immediate promisee and third persons yet unknown and unnamed, it is difficult to see how any contract could be presumed to arise between the promisor and such unknown persons. What parties would be in existence in such case whose assent could be implied? Or is the consent of the unknown parties to remain in abeyance till their claims arise in the future?

Again, the intention of the parties is the matter chiefly to be considered in the construction of contracts. Now, where one person agrees with another to pay the debt, or perform some specific obligations, of

the latter to a designated third person, it may well be inferred that the contracting party intends to bind himself to such third person. The promisor, in such case, could discharge his undertaking by paying a sum of money, or performing a definite obligation, to a party named and designated. But suppose the promisor should agree with his immediate promisee to perform indefinite future obligations, which may arise out of transactions in which the promisee is concerned, involving, possibly, numerous parties; could it reasonably be inferred that the promisor intended to bind himself directly to such unnamed parties upon uncertain future obligations? The promisor might well be content to deal with his immediate promisee, and bind himself directly to him, and wholly unwilling to expose himself to the liability of being sued by many unnamed parties upon contingent obligations.

The foregoing views are expressed with becoming caution. I present them merely as suggestions which may serve to bring the conflicting cases into harmony. Independent of the general reasonings of the court, it is manifest that upon the special facts and circumstances of this case the demurrer is well taken. In the present case the defendant entered into direct covenants with the railway company for its indemnity. The defendant agreed substantially to provide for the payment of all claims and damages which might accrue to third persons in the progress of the work, whether such claims and damages should grow out of the operations of the defendants themselves, or their subcontractors, and the contract expressly provided for a method by which the amounts claimed should be ascertained. It was agreed that the railway company might ascertain the sums due in the way stipulated, and withhold the money from the defendant, and pay it to the claimants. By the terms of this contract the defendant had a right to deal directly with the railway company, not with the numberless individuals by whom claims might be asserted against subcontractors. There is an essential difference between an undertaking to answer thus the defendant's promisee, and to meet directly the demands of many unknown claimants upon future and contingent obligations. The defendant might well intend by his contract to do the one and not the other. In what way was the defendant to adjust, settle, and ascertain the sums due upon the innumerable claims which might be asserted against his subcontractors? Can it be presumed that, because the defendant was willing to stipulate that the railway company should ascertain the sums due and pay them, the defendant himself would undertake their adjustment, and expose himself to numberless suits by dissatisfied claimants? Would not such a presumption result in extending the defendant's contract beyond what the defendant can reasonably be inferred to have intended? Because he was willing to expose himself to the suit of his immediate promisee, can it be inferred that he intended to make himself liable to many suits by unknown parties upon numberless contingent obligations?

Again, the contract in question imposed upon the immediate par-

ties to it mutual and dependent obligations. It contemplated future duties to be performed by both parties. The defendant could not be held bound to pay off and discharge all debts, claims, damages, etc., that accrued in the progress of the work, unless the railway company fulfilled the contract on its part. Now, in this common-law suit by a merchant for supplies to a subcontractor, could the defendant plead a breach of the contract by the railway company, and could the court, in a trial before a jury, go into an inquiry as to the transactions between this defendant and the railway company, showing a breach of the covenants of the contract, in order to bar the plaintiff's action?

The court sees almost insuperable difficulties in maintaining this action in a court of common law. In the first place, how was Fitzgerald to ascertain what sums are due to the numberless persons—merchants, laborers, mechanics, teamsters, material-men, etc.—who may have entered into contracts with or performed labor for his subcontractors? What *data* has he with which to adjust and settle their various demands? Suppose the claims of the various parties referred to be contingent and disputed, how can he assume, as between the claimants and his subcontractor, to determine them? Again, suppose Fitzgerald should make a mistake, and, upon his own adjustment of claims against the subcontractor, pay to claimants sums not due them; would the subcontractor be bound by such an adjustment? Might he not show that Fitzgerald had paid sums not due from him, and compel payment a second time of sums so paid by Fitzgerald to claimants on his account? Again, suppose judgment be entered here against the defendant in the several actions now pending; would the subcontractor, Stout, be bound by the judgments? He certainly would not, and if the defendant should pay such judgments it would be open to the subcontractor to compel him to pay them over again, by showing either that nothing was ever due to the claimants, or that, if anything was originally due, full payment or satisfaction had been made by the subcontractor himself.

In deciding this question, however, I rely rather upon the decision of the supreme court in the case of *National Bank v. Grand Lodge*, 98 U. S. 123, than upon any reasonings of my own. I can see no distinction in principle between that case and the present.

Demurrer sustained.

The decision upon this demurrer also disposes of *Baldwin v. Fitzgerald*, *S. M. Crooks & Co. v. Same*, *J. M. Crooks & Co. v. Same*.

SWANN v. SWANN.

(Circuit Court, E. D. Arkansas. April Term, 1884.)

1. STATE LAWS—UNITED STATES COURTS—JUDICIAL NOTICE.

The circuit courts of the United States take judicial notice of the laws of the several states.

2. CONTRACTS VALID WHERE MADE, VALID EVERYWHERE—EXCEPTIONS.

The general rule is that a contract valid by the law of the place where it is made is valid everywhere; but there are exceptions to this rule, and, among them, contracts against good morals, and that tend to promote vice and crime, and contracts against the settled public policy of the state, will not be enforced, although they may be valid by the law of the place where they are made.

3. LORD'S DAY CONTRACTS—VALID IN TENNESSEE, WHEN.

In Tennessee isolated private contracts made on the Lord's day, outside of the ordinary calling of the parties to them, are valid.

4. SAME—ARKANSAS RULE.

Prima facie, contracts made in Arkansas on the Lord's day are void; but contracts made in that state, on that day, between parties who observe as a day of rest any other day of the week, agreeably to the faith and practice of their church or society, are valid.

5. SAME—COMMON LAW.

At the common law, contracts made on the Lord's day were as valid as those made on any other day.

6. PUBLIC POLICY—HOW ASCERTAINED.

The only authentic and admissible evidence of the public policy of a state, on any given subject, are its constitution, laws, and judicial decisions.

7. LORD'S DAY ACTS—POLICE REGULATIONS.

The Lord's day acts are not religious regulations; they are a legitimate exercise of the police power, and are themselves police regulations.

8. LORD'S DAY CONTRACTS—UPON WHAT GROUNDS VOID.

Contracts made on the Lord's day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act,—no matter what that act may be,—a court of justice will not enforce a contract made in violation of such statute, and in the making of which the parties to it incurred the prescribed penalty. A penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue.

9. SAME—WHEN ENFORCED.

When, by the laws of a state, a large class of its citizens may lawfully labor and make contracts on the Lord's day, it is not, in a legal sense, against the public policy of such state, nor shocking to the moral sense of its people, for its courts to enforce a contract made on that day in another state, and valid by the law of that state.

10. SAME—VALID WHERE MADE, ENFORCED EVERYWHERE.

A contract made on the Lord's day, and valid by the law of the state where made, will be enforced by the courts of another state, by the laws of which such contract would be void.

At Law.

Ratcliff & Fletcher, for plaintiff.

Clark & Williams, for defendant.

CALDWELL, J. This suit is founded on a promissory note of which the defendant is the maker and the plaintiff the payee. The defense is that the note was executed on the Lord's day. The proof shows the note was executed on that day in the state of Tennessee, where the parties to it then resided, for the consideration of a valid pre-

existing debt due from the defendant to the plaintiff. There is no place of payment fixed in the note.

In *Tucker v. West*, 29 Ark. 386, a note executed in this state on the Lord's day was held to be void under the statute. This court takes judicial notice of the laws of the several states. *Owings v. Hull*, 9 Pet. 607; *Railroad Co. v. Bank of Ashland*, 12 Wall. 226.

By the law of Tennessee, where the note was executed, it is a valid obligation. In *Amis v. Kyle*, 2 Yerg. 31, the supreme court held that the statute of that state only prohibited labor and business in the "ordinary calling" of the parties; and that isolated private contracts, made by parties outside of their ordinary calling, are not invalidated. This rule was carried to a great length in the case cited. An obligation, to be discharged in horses, was made payable on the Lord's day, and the court held the contract valid, and that a tender of the horses, to have the effect of discharging the obligation, must be made on that day. This was held upon the ground that the sale and delivery of horses was not the ordinary calling of either of the parties. The attention of the court has not been called to any later exposition of the law of that state than is contained in this decision, and it will be assumed that there is none.

Under the rule established in *Amis v. Kyle*, it is obvious the note, which is the foundation of this suit, was valid in Tennessee. The execution of a note for a pre-existing debt was probably not the ordinary calling of either of the parties. If it was, the burden of proof was on the defendant to show it. *Roy v. Johnson*, 7 Gray, 162; *Bloxsome v. Williams*, 3 Barn. & C. 232. The doctrine of the supreme court of Tennessee is the doctrine of the early English cases under the statute of 29 Chas. II. c. 7, which prohibited labor only in the "ordinary calling" of the parties. *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, *supra*; *Rex v. Whitnash*, 7 Barn. & C. 596; *Fennell v. Ridler*, 5 Barn. & C. 406; *Rex v. Brotherton*, 2 Strange, 702. It is also the doctrine of some of the American cases. *Hellams v. Abercrombie*, 15 S. C. 110; *Bloom v. Richards*, 2 Ohio St. 387; *George v. George*, 47 N. H. 27; *Hazard v. Day*, 14 Allen, 487. Of course, the law of this state has no extraterritorial operation, and cannot affect the validity of contracts executed elsewhere on the Lord's day. And the general rule is that a contract valid by the law of the place where it is made is valid everywhere, and will be enforced by the courts of every other country. But there are exceptions to this general rule, and among them contracts against good morals, and that tend to promote vice and crime, and contracts against the settled public policy of the state, will not be enforced, although they may be valid by the law of the place where they are made. Story, Conf. Laws, § 244; Westl. Int. Law, § 196; Whart. Conf. Laws, § 490.

The contention of the learned counsel for the defendant is that a court of this state ought not to enforce a contract made on the Lord's day in another state, though valid by the law of that state, because

the contract is the result of an immoral and irreligious act, and its enforcement here would shock the moral sense of the community and violate the public policy of the state. Assuming, but not deciding, that the determination of this question must be the same in this court that it would be in a court of the state, we will proceed to inquire whether there is any principle upon which a court of the state could refuse to enforce the contract in suit.

The common law made no distinction between the Lord's day and any other day. Contracts entered into on that day were as valid as those made on any other day. The contract in suit was voluntarily entered into, between parties capable of contracting, for a lawful and valuable consideration. It had relation to a subject-matter about which it was lawful to contract, and was a valid contract when and where it was made. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a state. The term, as it is often popularly used and defined, makes it an unknown and variable quantity,—much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws, and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources.

In *Vidal v. Girard's Ex'rs*, 2 How. 127, 198, it was objected by Mr. Webster that the foundation of the Girard college, upon the principles prescribed by the testator, was "derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania." In replying to this argument the court said:

"Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. * * *

What is there, then, in the constitution, laws, and decisions of this state evincing a public policy hostile to the enforcement of contracts lawfully made in other states on the Lord's day? The constitution of the state declares:

"No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given by law to any religious establishment, denomination, or mode of worship above any other. * * * No religious test shall ever be required of any person as a qualification to vote or hold office; nor shall any person be rendered incompetent to be a witness on account of his religious belief." Const. 1874, §§ 24, 26.

So much of the statute of the state as has any bearing on this question reads as follows:

"Sec. 1614. Every person who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or perform other services than customary household duties of daily necessity, comfort, or charity, on conviction thereof shall be fined one dollar for each separate offense.
* * *

"Sec. 1617. Persons who are members of any religious society, who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalties of this act, so that they observe one day in seven, agreeably to the faith and practice of their church or society."

It is obvious the statute does not attempt to compel the observance of the first day of the week, as a day of rest, as a religious duty. It would be a nullity if it did so.

In *Bloom v. Richards*, 2 Ohio St. 387, the court—THURMAN, J., delivering the opinion—said:

"Thus the statute upon which defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this state, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty."

And see, to the same effect, *Specht v. Com.* 8 Barr, 312; *City Council of Charleston v. Benjamin*, 2 Strob. 508.

In this country legislative authority is limited strictly to temporal affairs by written constitutions. Under these constitutions there can be no mingling of the affairs of church and state by legislative authority. All religions are tolerated and none is established. Each has an equal right to the protection of the law, whether Christians, Jews, or infidels. *Andrew v. Bible Society*, 4 Sandf. (N. Y.) 182; *Ayres v. Methodist Church*, 3 Sandf. (N. Y.) 377; *Cooley*, Const. Lim. 472. No citizen can be required by law to do, or refrain from doing, any act upon the sole ground that it is a religious duty. The old idea that religious faith and practice can be, and should be, propagated by physical force and penal statutes has no place in the American doctrine of government. Force can only affect external observances; whereas, religion consists in a temper of heart and conscious faith which force can neither implant nor efface. History records the mischievous consequences of all efforts to propagate religion, or alter man's relations to his Maker, by penal statutes. In religion no man is his neighbor's keeper, and no more is the state the keeper of the religious conscience of the people. The state protects all religions, but espouses none. Every man is individually answerable to his God for his faith and his works, and must therefore be left free to imbibe and practice any faith he chooses, so long as he does not interfere with the rights of his neighbor. The statute, then, is not a religious regulation, but is the result of a legitimate exercise of the police power, and is itself a police regulation. *Slaughter-house Cases*, 16 Wall. 36, 62, and cases cited; *Bloom v. Richards*, *supra*; *Specht v. Com.*, *supra*; *City of Charleston v. Benjamin*, *supra*.

Experience has shown the wisdom and necessity of having, at stated intervals, a day of rest from customary toil and labor for man and beast. It renews flagging energies, prevents premature decay, promotes the social virtues, tends to repress vice, aids and encourages religious teachings and practice, and affords an opportunity for innocent and healthful amusement and recreation. Neither man nor beast can stand the strain of constant and unremitting toil. Such a day, when designated by the state, is a civil and not a religious institution. No merely religious duty is enjoined. The statute does not require attendance on church, any more than it requires attendance to hear a lecture in support of infidelity. In point of lawfulness, there is no difference between an orthodox sermon and such a lecture on the Lord's day, in this state. The legislature might have required all persons to abstain from labor on the first or any other day of the week, without reference to their religious preferences or practices in that regard. But the statute of this state does not go to that length. While the law does not enforce religious duties and obligations as such, it has a tender regard for the conscience and convenience of every citizen in all matters relating to his religious faith and practice. The statute is catholic in its spirit, and accommodates itself to the varying religious faiths and practices of the people. In legal effect it declares every person must observe one day out of seven as a day of rest. But it does not attempt to bind all to the observance of the same day. Such a requirement would have the effect to compel many to observe two days of rest in each week,—the statutory day and the day which their religious faith constrained them to observe. The statute designates the first day of the week as the day of rest for all who do not by reason of their religious faith and practice observe some other day. Christians, who regard the first day of the week as a sacred day; infidels, who regard no day as holy; and Friends, who hold there is no more holiness in one day than another, but that all are to be kept holy,—are by the statute constrained to desist from labor on the first day of the week. On the other hand, Jews and Seventh-day Baptists may pursue their ordinary callings on that day, if they observe the seventh day of the week according to their faith; and Mohammedans may labor on the first, if they observe the sixth day of the week according to their faith. The statute grants to all persons, who, in the exercise of their religious faith and practice, observe one day in the week as a day of rest, the liberty of working on every other day of the week, without qualification or limitation. In this respect there is a pronounced difference between the law of this and some of the other states.

In many other states but slight regard is shown to those who observe any other than the first day of the week as a day of rest. The New York statute provides :

"Nor shall there be any servile working or laboring on that day, excepting works of necessity and charity, unless done by some person who uniformly

keeps the last day of the week, called Saturday, as holy time, and does not labor or work on that day, and whose labor shall not disturb other persons in their observance of the first day of the week as holy time."

The New Jersey statute provides that it shall be a sufficient defense for working on the Sabbath day, that the defendant keeps the seventh day as the Sabbath: "provided, always, that the work or labor for which such person is informed against is done and performed in his or her dwelling-house or workshop, or on his or her premises or plantation, and that such work or labor has not disturbed other persons in the observance of the first day of the week as the Sabbath." And it has been held that whatever draws the attention of others from the appropriate duties of the Lord's day disturbs them. And where one purchased a horse and gave his note for the same, in his own house, in the presence of his wife, the seller, and one other person, whose religious feelings were not at all shocked, and who made no complaint, it was held to be "to the disturbance of others." *Varney v. French*, 19 N. H. 233.

But the statute of this state draws no such invidious distinctions between those Christians who observe the first and those—be they Christians, Jews, or Mohammedans—who observe "any other day of the week, * * * agreeably to the faith and practice of their church or society."

It is not true, therefore, that all contracts made in this state on the Lord's day are void. A large number of the citizens of the state may lawfully labor and make contracts on that day. There can be no doubt of the validity of a note executed in this state on the Lord's day, when the parties to it refrain from labor on "any other day of the week, * * * agreeably to the faith and practice of their church or society." The validity of contracts made in this state on that day depends, therefore, on whether the parties to them conscientiously observe some other day of the week as a day of rest. If they do, their contracts made on the Lord's day are valid. Such contracts the courts of the state would be bound to enforce. If, then, it would be the duty of the courts of the state to enforce contracts made in the state between its own citizens on the Lord's day, having no relation to "household duties of daily necessity, comfort, or charity," how can it be said that the public policy of the state forbids the enforcement of such contracts made in another state, and valid by the law of that state? A court cannot declare that the public policy of the state evinces such a high regard for the sacredness of the Lord's day as to forbid it to enforce a contract lawfully made on that day in another state, when it is bound by law to enforce contracts made on that day in its own state. It may be justifiable in private life to "assume a virtue, though you have it not;" but courts, in the impartial administration of justice, are forbidden to assume a higher regard for the holiness of the Lord's day than is found in the constitution and laws of the state. To do so would deprive suitors of their

rights without law, and would, besides, be in the highest degree Pharisaical. And if the courts of the state would enforce contracts made on that day in the state between certain classes of her own citizens, how can the moral sense of the people of the state be said to be shocked by enforcing such contracts lawfully entered into elsewhere? No court is at liberty to impeach the constitution and laws under which it derives its jurisdiction and authority as a court, by assuming that what is lawful under them is shocking to the moral sense of the people who enacted them. But if no contracts made on that day in the state could be enforced, there would still be nothing in the objection that their enforcement would be too shocking to the moral sense of the community to be tolerated, for reasons forcibly stated by Judge REDFIELD, in delivering the opinion of the court in *Adams v. Gay*, 19 Vt. 358, 367:

"And before we could determine that any given cause shocked the moral feelings of the community, we must be able to find but one pervading feeling upon that subject; so much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions. Now, nothing is more absurd, to my mind, than to argue the existence of any such universal moral sentiment in regard to the observance of Sunday. It is in no just sense a moral sentiment at all which impels us to the observance of Sunday, for religious purposes, more than any other day. It is but education and habit, in the main, certainly. Moral feeling might dictate the devotion of a portion of our time to religious rites and solemnities, but could never indicate any particular time above all others."

It is believed the moral sense of the community would esteem it a morally dishonest act for a debtor to refuse to pay a just debt because the evidence of it was executed on the Lord's day. Christians vary in their opinions of the manner in which the Lord's day ought to be kept. In continental Europe, sports, games, and practices are freely indulged in on that day, with the approval of the church, which the larger number of Protestant churches of England and this country do not approve.

The large emigration from Europe to this country is having a marked influence on public opinion, particularly in towns and cities, as to how the Lord's day ought to be kept. The Puritan view of the question has undergone some modifications through this influence. As a result of less restricted views on the subject, in this city, in the shadow of the capitol there are more than half a hundred places where spirituous liquors are sold on Sunday, the same as any other day in the week, without molestation from the state or city authorities. It would be downright hypocrisy for a court to affect to believe that the moral sense of the community, which supports this condition of things, would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's day. There may be a good many individuals who would feel so, but they do not constitute the community in the legal sense of that term.

It is an error to suppose that the supreme court of the state, in v.21F,no.5—20

Tucker v. West, *supra*, held Lord's day contracts void on religious or moral grounds. [See note.] That is not the ground upon which they are held void by any of the courts. The court held that the execution by the maker and the receipt by the payee of a promissory note was "labor," within the meaning of that word, as used in the statute.

It of course follows that the parties to a note executed on the Lord's day incur the penalty of the statute against those who labor on that day, viz., a fine of one dollar. By reference to the statute it will be observed that it does not in terms prohibit labor, or declare contracts void. It simply denounces a penalty against those "found laboring." Here two familiar and established rules of decision come into play. One of these is, that a penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue, though there are no prohibitory words in the statute; and the other is, that a court of justice will give no assistance to the enforcement of contracts which the law of the land has interdicted.

"The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction." *Cranson v. Goss*, 107 Mass. 439; *Holman v. Johnson*, Cowp. 341; *Gibbs & Sterrett Manuf'g Co. v. Brucker*, 111 U. S. 597; S. C. 4 Sup. Ct. Rep. 572. There have been vigorous protests from time to time against the application of these principles to Lord's day contracts, upon the ground that they inflicted penalties, by judicial construction, out of all proportion to the offense, and not contemplated by the act, (*Bloom v. Richards*, *supra*; and see remarks of GRIER, J., in *Philadelphia, W. & B. R. Co. v. Philadelphia & Havre de Grace S. B. Co.* 23 How. 218;) but the great weight of authority is that a contract made in violation of the Lord's day acts is void, like any other illegal and prohibited contract, and upon no other or different ground. And the reason that a contract made in this state on the Lord's day between persons "who observe as Sabbath any other day of the week" is not void, is that the statute expressly declares they "shall not be subject to the penalties of this act," and as there is no prohibition in terms in the statute, it results that there is neither penalty nor prohibition against such persons making contracts or performing any other kind of labor on the Lord's day. But if by the statute all contracts made in this state on the Lord's day were void, it is believed that the result in the case at bar would not be different.

There is often great difficulty in practice in drawing the line between the foreign contracts which may and may not be enforced. The rules defining the comity of states in this regard are necessarily general in their terms, and the adjudged cases are not quite uniform. No case has been cited, and it is believed none can be found, holding that

a contract made on the Lord's day in a state where such contracts are valid, will not be enforced by the courts of another state, by the laws of which such contracts are void. But there is one case at least (there may be others which our limited examination failed to discover) that holds that in such case the contract will be enforced. The case is entitled to consideration, no less on account of the uniform high character of the decisions of the court than the acknowledged learning and ability of the judge who delivered the opinion. In *Adams v. Gay*, *supra*, the precise question arose. A contract which, if it had been made in Vermont, would have been void under the Lord's day act of that state, was made in New Hampshire on the Lord's day. In a suit arising upon that contract in Vermont, the question arose whether the courts of that state would give it effect. The court refused to take judicial notice of the law of New Hampshire, and did not indulge the presumption that it was the same as that of Vermont. The court, Judge REDFIELD delivering the opinion, said:

"The law of New Hampshire, then, being out of the case on account of its not having been proved at the trial, the contract between the parties is valid, unless it is void upon general principles of public policy, as being of evil example to our own citizens to see such a contract enforced in a court of justice."

And, after a full discussion of the subject, the court, on the assumption that the contract was valid in New Hampshire, held it valid in Vermont.

It has been decided that contracts for the purchase of lottery tickets, if valid where made, will be treated as valid and enforced in the courts of a state by the laws of which such contracts are illegal. *McIntyre v. Parks*, 3 Metc. 207; (in *Webster v. Munger*, 8 Gray, 587, THOMAS, J., expresses the opinion that *McIntyre v. Parks* was not rightly decided;) *Kentucky v. Bassford*, 6 Hill, 526. And the same doctrine has been maintained with reference to gambling contracts. Whart. Conf. Laws, §§ 487, 492.

This court is not to be understood as expressing any opinion as to the soundness of the doctrine of the cases last cited. They carry the doctrine of comity further than it is necessary to go to uphold the action in the case at bar. Lottery and gambling contracts are very generally regarded as inherently vicious and immoral, and wanting in a meritorious consideration, whenever and wherever made. Whereas, the contract in suit was not only obligatory where made, but was made for a valuable and meritorious consideration; and the only objection to its validity is that it was executed on an inappropriate day of the week,—a circumstance in which it would seem a state, other than that in which the contract was made, could have very little concern.

It has been held that when the law of the state where the contract was made, and the law of the state where the suit is brought, are the same, and a contract made on the Lord's day is void by the laws of both states, it will not be enforced; and that, in the absence of proof

to the contrary, the law will be presumed to be the same in both states. *Hill v. Wilker*, 41 Ga. 449; *Sayre v. Wheeler*, 32 Iowa, 559.

NOTE. Remarks may occasionally be found in opinions of courts, seemingly laying some stress on the religious view of the question, and the fourth commandment. In illustration of this fact, the case of *Hill v. Wilker*, 41 Ga. 449, may be cited, where the court, to support the presumption that the law of Kansas, like that of Georgia, forbid contracts on the Lord's day, say: "We are sustained in this presumption by the fact that a contrary view would suppose the people of Kansas to have annulled the decalogue, and to have permitted by law the disregard of Christian obligation, and not only forgotten, but violated, the injunction: 'Remember the Sabbath day, to keep it holy: on it thou shalt do no manner of work.'" The court overlooks the fact that the fourth commandment, a part only of which it quotes, relates to the seventh day of the week; and that if the laws of Kansas were in harmony with that commandment, the contract which the court was considering, to have been invalid there, must have been executed on Saturday.

The curious and obvious error of the court in *Hill v. Wilker* illustrates the danger of a civil court, which deals only with the temporal affairs of men, predicating a judgment on its interpretation of the Bible commands relating to spiritual affairs, and justifies a brief reference to the origin of the Lord's day, and the legal distinction between that and the Sabbath. It is a common error to confound Saturday, the seventh day of the week, the Sabbath of the Jews, and the day of rest named in the fourth commandment, with Sunday, the first day of the week, properly called the Lord's day. At an early period in the history of the Christian church, the first day of the week was set apart as a holy day, in memory of the resurrection of our Lord on that day. It was called the Lord's day, which is still its legal name, (3 Toml. Law Dict. tit. "Sunday;") but Sunday, the heathen name for the day, and Sabbath, the name of the Jewish day of rest, are now commonly used indifferently to designate the day, and are so used in the statute of this state.

Writers on ecclesiastical law are not quite agreed as to what extent the obligations of the commandment and the Levitical law were abrogated by the advent of our Savior; but conceding that the fourth commandment delivered to the Jews is of universal obligation, the fact remains that that commandment has never been observed by the Christians so far as relates to the day of the week. The commandment declares explicitly that "the seventh day is the Sabbath of the Lord, thy God." While many of the commandments are very short, that relating to the observance of the Sabbath is worked out at considerable length, and great stress is laid on the day of the week to be observed, and the reason for observing that day.

The commandment to observe a day of rest is not any more explicit than the direction as to what day it shall be. Exodus, xx. 8, 11. There is no account in the New Testament of the change from the seventh to the first day of the week, nor even of the institution of the Lord's day. Just when and by whom it was instituted, and when it was first observed as the day of worship, and how it was otherwise observed, are questions involved in some obscurity. It was instituted sometime, and probably very shortly, after the resurrection of our Savior, and derives its character as a sacred day from that fact, and the consent and practice of the early church and the apostles. The celebration of the Sabbath probably existed before the time of Moses. However this may be, it has antiquity and an explicit command of the Old Testament to support its claims. The Lord's day has the practice of the apostles and Christian church since the resurrection of our Lord. The week of seven days is not found elsewhere, except among the Egyptians, and there no day

of rest was observed. At one period in their history the Jews observed the Sabbath with great strictness, not even defending themselves in time of war on that day, and punishing Sabbath-breaking capitally. Exodus, xxxi. 14; Numbers, xv. 32-36. The method of observing the day entered largely into their ceremonial code. They were much incensed at our Lord and His disciples for their desecration of the day, according to the Jewish law; and it was when challenged by the Pharisees for profaning the Sabbath that our Lord, after defending his disciples, boldly announced that "the Sabbath was made for man and not man for the Sabbath; therefore, the son of man is Lord also of the Sabbath." St. Mark, ii. 27, 28. By the Jews, who regarded the Sabbath as the everlasting covenant between God and Israel, (Exodus, xxxi. 15, 16,) the reply of our Lord to their accusation was looked upon as sacrilege. The liberal notions of our Lord with regard to the Sabbath deepened and widened the gulf between him and the Jews, and ultimately resulted in the complete repudiation of the Jewish Sabbath by the Christians, who substituted for it the day of the week on which our Lord rose from the dead.

GRAFTON v. B. & O. R. Co.¹

ZWEIG v. SAME.¹

(Circuit Court, S. D. Ohio. July, 1884.)

1. LAYING RAILROAD TRACK IN PUBLIC STREET—MEASURE AND EFFECT OF RECOVERY BY ABUTTING LOT-OWNER.

Where a railroad company had, by consent of the municipal authorities, laid its track upon a public street, and such occupancy permanently obstructs the use of the street, not only by the public, but also by the occupiers of abutting lots, in an action by the owners of such abutting lots against the railroad company for damages, *held*, that they were entitled to recover full compensation for the depreciation in the value of their property caused thereby. In estimating the damages the same standard was to be applied as in direct proceedings by the railroad company to condemn for its use the private right of such owners in the street. A recovery in this action will estop the owners from claiming that such occupancy was without their consent, and that full compensation had not been made for it.

2. SAME.

Sections 3283 and 6448, Ohio Rev. St., upon the subject, construed.

Motions for New Trials.

John W. Herron (of Cincinnati) and *Cowen & Smith*, (of Bellaire,) for plaintiffs.

Hoadly, Johnson & Colston (of Cincinnati) and *J. H. Collins*, (of Columbus,) *contra*.

MATTHEWS, Justice. These cases have been submitted on motions for new trials, based upon an alleged error of law in the charge of the court to the jury. The plaintiffs are respectively owners in possession of lots of land abutting on a public street in the incorporated village of Bellair, in Belmont county. The street in front of their prem-

¹ Reported by J. C. Harper, Esq., of the Cincinnati bar.

ises, and elsewhere, has been and is occupied by the defendant, under an agreement to that effect with the municipal authorities, for the track of their railroad, the superstructure of which is laid upon stone piers, built in the street, and which permanently obstructs its use, not only by the public, but by the occupiers of adjacent lots, rendering the access to them less beneficial, and, as is alleged, seriously and substantially impairing the value of the property. The object of these actions was to recover the damages thereby occasioned.

On the trial the court rejected the offer of evidence tending to prove a depreciation in consequence of this occupation of the street in the value of the lots for purposes of sale, and in its charge to the jury limited the right to the recovery of damages to the diminished rental value of the premises calculated to the date when the action was brought, instructing the jury to make no allowance for any loss arising from a depreciation in the price at which the property would sell. The reasons on which the correctness of this ruling of the court is maintained, as stated in the charge itself, are two. They both involve a construction of section 3283, Rev. St. of Ohio. That section authorizes a railroad company and a municipal corporation to agree "upon the manner, terms, and conditions upon which the former may use and occupy, for the purposes of its railroad, the public streets of which the latter has charge, and provides that in case of disagreement the railroad company may appropriate so much of the street required as may be necessary, "in the manner and upon the same terms as is provided for the appropriation of the property of individuals," and adds the following: "But every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track."

1. It was considered by the court in its charge to the jury that the limitation of two years, prescribed by the statute for bringing actions for injuries referred to, proceeded upon the supposition of successive actions for such injuries as they might arise, and therefore contemplated a recovery in each case of such damages only as should be actually realized from them during the period limited by the bringing of the action in each case. But this construction is arbitrary, not founded on any sufficient reason, and not reconcilable with the plain and literal reading of the section. The statute does not by its terms limit the right of recovery to any particular class of injuries, but declares the right to recover for all; it rather contemplates one action to embrace them all, than many in succession, as the injurious consequences arise; and appears to limit the right to sue to a period of two years from the completion of the work, as if that was a reasonable time within which the whole injury in all its consequences would be fully, at least sufficiently, developed, to furnish a

reasonable and satisfactory basis for estimating the compensation which ought to be paid. At any rate, there does not appear to be any ground, in the words or intention of the act, for a distinction between temporary injuries to the use, and permanent injuries to the value, of the property injured; and, in the absence of any ambiguity, the statute must be taken to mean what it plainly says; and, there being no sufficient reason to the contrary, must be so construed that the railroad company, in the case contemplated, shall be held responsible for all injuries of every description done by its work to the property of the plaintiffs in the action. It is not necessary to consider whether more than one action could be maintained, if brought within the period of limitation; for it is enough to say that no damages could be the subject of a second or subsequent action, which were embraced in a former recovery.

2. It was, in the second place, considered by the court, that as by the settled law of Ohio, which, of course, is the law to be administered by this court in these cases, the plaintiffs may by section 6448, Rev. St., require the railroad company to appropriate their right of property in the street, and thus obtain compensation for being deprived of it, they are not at liberty to recover the same compensation in these actions; more especially for the reason that in the proceeding for appropriation the railroad company obtains, for the compensation it may be required to pay, an equivalent, in being confirmed in the right to use the property appropriated, while a recovery in the present actions leaves them still without title to the use which they have wrongfully taken, and subject to further proceedings under section 6448, by which they might be compelled to make the same compensation a second time. An examination, however, of the language of section 6448, shows that it is limited to cases where the railroad corporation has taken possession of and is occupying or using the land of another; language that does not, at least, most aptly describe the incorporeal right of an adjacent lot-owner in the public street on which it abuts, although, possibly, it may be held to include it. Nevertheless, it does not appear that section 6448 was intended to any extent to displace the remedy expressly given by section 3283, or to modify its extent and application. The two are quite consistent, and may both stand as furnishing to the private proprietor an election of remedies. He cannot have both, either concurrently or in succession; and a recovery under section 3283 for all injuries done to his property by the occupancy complained of, would estop him from claiming, under section 6448, that such occupancy was without his consent, and that full compensation had not been made for it.

This conclusion is not inconsistent with the decision of the supreme court of Ohio in the case of *A. & G. W. R. Co. v. Robbins*, 35 Ohio St. 531. It was there held that "the owner of land which has been unlawfully and wrongfully taken and appropriated to its use by a corporation authorized by law to appropriate land, cannot maintain an

action for the value of the land so taken and appropriated, and also damages accruing by reason of such taking and appropriation, if the circumstances are such that he may recover the land itself." It is manifest that this rule cannot apply to cases like the present, where the property taken is the special interest of the lot-owner in the adjoining street, for the reason expressed in the first qualification, because the circumstances are such that he may not recover the property taken. The railroad company, by agreement with the municipal authorities, acquires the right as against the public to the use of the street for its purposes; and, although that gives no right as against the adjacent lot-owner, neither is the case one where the latter, consistently with the rights of the railroad company, can recover *in specie* the individual property right sought to be subjected to the use of the railroad. The alternative to which the adjoining proprietor is limited is either by injunction to prevent the railroad company from the occupation of the street, under the license from the public authorities, until it has made compensation for the threatened injury to private rights, or to prosecute the action for damages given by section 3283. It is not a case where there could be any recovery of possession, for the thing taken is incorporeal.

That the action for damages occasioned by the conversion of the street to railroad uses embraced in such cases full compensation for the private right appropriated as would be estimated in direct proceedings for that purpose, was distinctly held in *Hatch v. C. & I. R. Co.* 18 Ohio St. 92, and was recognized in *Railroad Co. v. Cobb*, 35 Ohio St. 94; in *Railroad Co. v. Williams*, Id. 168; in *Railroad Co. v. Mowatt*, Id. 284; and *Ry. Co. v. Lawrence*, 38 Ohio St. 41; and the right in such a case to recover for permanent injury to the adjacent property was distinctly decided in *L. M. R. Co. v. Hambleton*, reported in supplement to Weekly Law Bulletin, vol. 11, p. 100, to appear in 40 Ohio St.

It follows from these views that the charge of the court was erroneous in not permitting a recovery for injury done by the occupation of the street by the railroad company to the premises of the plaintiffs, resulting in the permanent depreciation in value, and for that reason the verdicts are set aside and new trials granted.

CELLULOID MANUF'G Co. and another v. PRATT and others.

SAME v. COMSTOCK and others.

Circuit Court, D. Connecticut. July 31, 1884.)

PATENT—HYATT'S PATENT CELLULOID PIANO KEYS.

It is an infringement of the first claim of the Hyatt patent (No. 210,780) if a substantial portion of the upper surface of the key-board of a piano or organ is covered with a single sheet of celluloid, but it is not an infringement to cover single keys with separate strips of celluloid.

In Equity.

J. E. Hindon Hyde and Frederic H. Betts, for plaintiffs.

George B. Ashley and Francis C. Nye, for defendants.

SHIPMAN, J. These are two bills in equity, each charging the respective defendants with the infringement of letters patent No. 210,780, dated December 10, 1878, to the Celluloid Manufacturing Company, assignee of John W. Hyatt, for an improvement in the manufacture of piano keys.

At the date of the patented invention, piano keys and organ keys were always covered with ivory. The "head" of the key is that portion which is in front of the sharps, or black keys, and the "tail" is that portion which extends backward between the sharps. The "front" of the key is the portion which is below the head. After the blank wooden key-board was made, and the spaces which the keys were to occupy had been properly designated, the next step was to cover the fronts with strips of ivory. Before 1860, white holly wood was used for the fronts. When ivory was used, the fronts were made by gluing strips large enough to cover the fronts of two keys, or the front of one key, and sometimes, as in Steinway & Sons' factory, the entire front of the board was covered with a single strip. Each head was then separately glued on, and each separate tail was thereafter joined to each head, and the board was then sawed into the separate keys. The top of the right-hand key was frequently covered with one strip. The public taste required that the fronts should match each other, and that heads and tails should also be of the same grain and color, and that the entire top surface of the white keys should also be matched.

While the method of construction which has been described was the one in general use, the whole of each key—head, front, and tail—had been made of a single piece of ivory, under the Needham patent. The entire upper surface of each of two key-boards was once covered, in the factory of Steinway & Sons, of New York, with a single sheet of ivory, but this was an exceptional feat, performed with an exceptionally beautiful and evenly grained piece of ivory. All the heads of the keys upon a key-board have also been covered with a single strip of ivory. Seventy-five key-boards were made in this way by Pratt,

Read & Co., of Meriden. This experiment was not repeated by that firm.

The objections to covering a large space with a single strip are that the ivory is apt to "check," or have small cracks, and that, being non-plastic, it does not uniformly adhere to the wood, and also that the grain is not uniform, and that, therefore, heads and tails do not match each other. The covering of a large surface with ivory was not unknown; it had been done in exceptional instances; but it was not practicable to make keys in this way; and the only practical and commercial method of manufacture was by gluing separate strips to the upper surface of separate keys.

After the invention of the article to which the trade name of celluloid was given, Mr. Hyatt endeavored to make celluloid keys in the same manner in which ivory keys had been made, but was unsuccessful. He then succeeded in covering the entire upper surface of a key-board with a sheet of celluloid, fastened to the wood with the usual celluloid cement. This method of construction was economical of time, and has reduced the price of the cheaper grade of keys. The invention did not consist in the substitution of celluloid for ivory, whereby a reduction in the price of keys was caused, but it consisted in the fact that, by the use of celluloid, there was practically furnished a new and useful mode of constructing key-boards, viz., by cementing to the board a single sheet of the veneer, instead of by gluing a large number of separate pieces of ivory, which must each be matched and separately fastened to the wood. This new method of construction was impracticable with ivory, or with any material which was known before celluloid was manufactured, and it required invention to find out and demonstrate that key-boards could be manufactured, so as to be a commercial article, by covering their upper surfaces with a single sheet of a material which would make an attractive and permanent coating for the wooden keys, because, from the fact that celluloid existed, it by no means followed that a key-board could be efficiently and successfully covered with it. The defendants do not deny the patentability of the invention, but place their case upon non-infringement, as they construe the patent.

The patentee describes his invention, in the descriptive part of his patent, as follows:

"It consists in covering a suitable key-board blank, on its exposed upper surface and edge, with a sheet or scroll of some plastic composition, which is cemented or otherwise caused to adhere to the surfaces whereon it is desired. After being thus coated, the blank is sawed or otherwise severed into sections, each one of which constitutes a covered key. * * * In the accompanying drawings, A represents a key-board blank, composed of wood or any other suitable material, of the size and contour required to form the number of keys of the dimensions required. Over the upper surface and outer edge of this blank, and cemented or otherwise secured thereto in a suitable manner, is provided a thin sheet or scroll, B, of plastic composition. So far as known, the material termed 'celluloid' is the best adapted to the purpose of

covering the blank, though it is plain that other materials of a plastic nature may answer. The covering of the blank with the sheet of composition or material completes the first essential step towards the production of the invention. The next operation is to sever the blank into sections of the desired size to form the keys, D."

The claims of the patent are the following:

"(1) As a new article of manufacture, a blank key-board covered with a continuous strip or roll of plastic composition, substantially as specified. (2) The within-described process of forming piano or analogous keys, which consists in covering a key-board blank with a strip of plastic material, and then cutting out each key from the coated blank, substantially as specified."

The specification and the first claim, if it is construed literally, describe a broader invention than Hyatt made. His invention did not consist in covering a key-board with any plastic composition, because he knew nothing of the adaptability for the purpose of any other material than the one which has the general name of celluloid; neither did he know how any other material could be cemented or fastened to the wood. His invention was confined to the materials upon which he successfully experimented, and his patent is to be limited to plastic composition of the nature and character of celluloid, and cemented to the wood with the cement with which celluloid is usually caused to adhere to another surface.

Each defendant is a manufacturer of piano and organ keys, and covers the upper surfaces and edges of some of its key-boards each with a sheet of chrolithion, or celluloid, and also covers the fronts of the same key-boards each with another strip of the same material. They insist that this is not an infringement of the plaintiffs' patent, which they construe to be for a covering of the upper surface and the front of a key-board with one sheet of celluloid. The patent speaks of covering the "upper surface and outer edge" of the blank, but it is manifest from the drawings that the outer edge does not mean the front, but the edge of the top of the key-board. The defendants do not always cover the whole of the top with a single sheet of celluloid, but sometimes use two sheets. It is an infringement if a substantial portion of the upper surface of the key-board is covered with a single sheet, but it is not an infringement to cover single keys with separate strips of celluloid.

The second claim of the patent seems to have been inserted for the mere purpose of having more than one claim. As a statement of the invention, which consisted in covering the upper surface of a key-board with a single sheet of celluloid, it is useless, and, as a statement of the process of making key-boards, it is incorrect. It is far preferable to cement an unpolished than a polished sheet to the key-board, as the inventor well knew, and therefore the next operation, after cementing the sheet, is to level and polish it. The defendants do not use the process which is described in this claim.

Let there be a decree for an injunction against the infringement of the first claim, and for an accounting.

BOSTOCK v. GOODRICH.¹*(Circuit Court, E. D. Pennsylvania. June 2, 1884.)*

1. PATENTS—ADDITIONAL FEATURES—IMPROVEMENT UPON FORMER INVENTION—INFRINGEMENTS.

Letters patent for an improvement made to a patented invention, by additional features having no material effect upon the character, operation, or result produced, do not confer upon the subsequent patentee a right to use the original device.

2. SAME—SPLITTING UP AND MULTIPLYING CLAIMS.

The practice of unnecessarily splitting up and multiplying claims disapproved.

3. SAME—EVIDENCE—INCONSISTENT CONDUCT OF RESPONDENT.

That the respondent offered a large sum of money for a patent, and subsequently took out patents for similar devices, are facts to be considered as being inconsistent with his subsequent contention of want of novelty in the patent.

4. SAME—SEWING-MACHINE TUCK-CREASERS—LETTERS PATENT NOS. 64,404, 80,269, 81,160, 117,501.

Letters patent No. 64,404, issued May 7, 1867, and No. 80,269, issued July 28, 1868, to Edward Bostock, for improvements in sewing-machine tuck-creaser, are not shown to want patentable novelty, and are infringed by the devices constructed under letters patent No. 81,160, issued August 18, 1868, and No. 117,501, issued May 16, 1876, to Henry C. Goodrich.

In Equity. Hearing on bill, answer, and proofs.

Bill to restrain an alleged infringement of claims Nos. 2, 3, 5, and 6, of patent (No. 64,404) issued May 7, 1867, to Edward Bostock, and claim No. 1 of patent (No. 80,269) issued July 28, 1868, to said Bostock for improvements in sewing-machine tuck-creasers assigned by mesne assignments to Sarah L. Bostock. Respondent contended that there was no patentable novelty over 21 prior patents, and alleged that the devices made and sold by the respondent under letters patent (No. 81,160) issued August 18, 1868, to Henry C. Goodrich, and (No. 117,501) issued May 16, 1876, to said Goodrich, for improvements in tuck-creasers for sewing-machines, were distinguishable from the Bostock invention in the construction and mode of operation.

H. T. Fenton and W. W. Ledyard, for complainant.

West & Bond, (of Chicago,) for respondent.

BUTLER, J. The patent No. 80,270, of July 28, 1868, having been withdrawn from the case, we have for consideration only those of No. 64,404, of May 7, 1867, and No. 80,269, of July 28, 1868. Of No. 64,404 the defendant is charged with infringing claims 2, 3, 5, and 6, and of No. 80,269, claim 1. The defense set up is want of novelty, and non-infringement. The patentee has pursued the usual and reprehensible practice of unnecessarily, if not improperly, splitting up and multiplying claims. Its effect here (which may be unimportant) we are not called upon to consider. The patent No. 64,404 covers a

¹ Reported by Albert B. Guilbert and H. W. Watson, of the Philadelphia bar.

right-angled base-plate, a right-angled spring-arm, and a gauge-plate, with downward projection, combined as described in the specifications and stated in the claims. No. 80,269 embraces the same matters, and also an improvement on the original device, which consists in transferring the slot, through which annexation to the sewing-machine is made, from the base-plate to the gauge-plate.

The first branch of the defense is not, we think, sustained by the proofs. No one of the several prior inventions exhibited, seems to cover the combination embraced in the plaintiff's claims. Considerable embarrassment was encountered in passing upon this question, from the absence of proper models, and from the conflict of expert testimony. The burden of proof being on the defendant, any disadvantage resulting from this cause falls upon him. It was his duty to show the alleged anticipation distinctly and clearly. He has not done so, and the original presumption in favor of the patent must, therefore, be allowed to stand. This presumption is greatly strengthened here by his offer of a large sum of money for the patents, in 1870. This offer to purchase is irreconcilable with his present attitude, as are, also, his acts in taking out several patents for similar devices,—which, according to the defense set up, are anticipated and old.

Nor do we think the second branch of defense has been more successful. Here, again, the expert testimony is in direct conflict. A comparison of the device manufactured by the defendant, however, with the plaintiff's, shows them to be essentially the same,—in design or purpose, in construction, method of operation, and effect produced. Exhibit E seems to possess every feature of the plaintiff's invention. The slight structural differences are unimportant. They have no material effect upon the character or operation of the machine, or the result produced. While the grooved wheel does not revolve, its pressure upon the knife below forms a crease, precisely as would be done if it turned. Whether the plaintiff's revolves, depends upon the extent of pressure applied and friction produced. If the defendant's device may be regarded as an improvement on the plaintiff's because of additional features, this will not justify his use of the plaintiff's invention.

A decree must be entered accordingly.

UNITED STATES v. COLGATE.

(Circuit Court, S. D. New York. August 9, 1884.)

INJUNCTION—INFRINGEMENT—LITIGATED PATENT.

The United States cannot be heard to ask an injunction restraining the commencement or prosecution of suits for infringement of a patent, for the repeal of which they have begun an action.

In Equity.

Elihu Root, U. S. Atty., *Charles M. Da Costa*, and *Wager Swayne*, for orator.

Frederic H. Betts, for defendant.

WHEELER, J. This suit is brought by direction of the attorney general, to repeal letters patent granting exclusive rights to inventions, and has now been heard on a motion for a preliminary injunction to restrain commencement or prosecution of suits for infringement. The patent has expired, and no injunction is asked against assignment of the patent. The right to maintain such a suit is placed upon the same ground as that to repeal a patent for land. *U. S. v. Gunning*, 18 FED. REP. 511. In a suit to vacate a patent for land it would hardly be claimed that the patentee should be restrained from preventing, or prosecuting suits for, trespasses to the land during the pendency of the suit. Such acts would work no injury to the title or property of the United States in question in the suit. The United States deals with the lands as a proprietor, and brings such suits to be restored to its proprietary rights. *U. S. v. Schurz*, 102 U. S. 378; *U. S. v. Stone*, 2 Wall. 525. Protection of the property would not impair those rights. Infringement of a patent is a trespass upon the exclusive rights granted. The United States, as an owner or proprietor, has no interest in promoting such trespasses; and their prevention, or the prosecution of suits for their commission, cannot be an injury to the United States as a proprietor. If the patent is repealed the suits may fall, or may not; but whether they do or not is a matter entirely between the parties to the suits, and not at all between the United States and either of the parties. No reason for granting the motion appears, and it must therefore be denied.

Motion denied.

PETERS v. ACTIVE MANUF'G CO.¹

(Circuit Court, S. D. Ohio, W. D. August 22, 1884.)

1. **PATENTS—PETERS' CARRIAGE DASHES—SHEATHS FOR APPLYING MOULDINGS.**
 Patent No. 178,463, granted George M. Peters for improvements in sheaths or holders for applying mouldings to the tops of carriage dash-boards, *held* to be anticipated by a machine used for putting mouldings on combs by means of a sheath constructed and operated similarly. That the machine was comparatively small, and used only for applying mouldings to combs, is immaterial.
2. **SAME—INFRINGEMENT—ANTICIPATION.**
 That which would infringe, if later, anticipates, if earlier.

In Equity.

J. W. Firestone and Wm. Hubbell Fisher, for complainant.

Stem & Peck, for respondent.

SAGE, J. This suit is brought upon letters patent No. 178,463, issued to complainant, June 6, 1876, for an improvement in tools for attaching sheet-metal mouldings. The specifications set forth the invention of certain new and useful improvements in sheaths or holders for applying mouldings to the tops of carriage dash-boards, and that it comprises a peculiarly constructed sheath or holder, wherewith the moulding may be applied expeditiously, and without bending or buckling, or injuring or marring, either the moulding or dash-board. The sheath may be made of one or more pieces of metal, or it may be made of wood lined with a metallic bushing. When made of two pieces or parts, which is the form preferred by the patentee, the pieces are connected by bolts and washers, and grooved so as to inclose the moulding; a key or other suitable stop being fitted within the sheath to prevent the moulding slipping through the groove. The sheath has undercut notches to receive the key, which is detachable, and serves as a stop or abutment for the rear end of the moulding to rest against. Notches may be cut at such distances from the front end of the sheath as may be required for the various lengths of mouldings to be used, or the notches and key may be dispensed with, and a screw stop, described in the specifications, substituted. The moulding consists of a sheet-metal tube, having a longitudinal slot or parting, and its forward end is made flaring or trumpet-mouthed, so as not to tear the leather coverings of the dash while the moulding is being applied. The dash is held perfectly rigid in clamps, and the sheath, containing the moulding and fitting it closely so as to prevent buckling, is drawn, by means of a cord or strap, attached to a hook or link, pivoted to the front end and guttered to avoid contact with the edge of the dash, along the upper edge of the dash, which projects above the clamps. As the sheath advances, the flaring mouth serves to conduct the leather margins of the dash into the longitudinal slot of the moulding, and, the sheath fitting the moulding closely, prevents any radial

¹Reported by J. C. Harper, Esq., of the Cincinnati bar.

distention and causes it to be fitted uniformly and securely to the dash. After the moulding has been drawn to its place on the dash, the sheath may be retracted without withdrawing the moulding. The flaring or trumpet end of the moulding is then filed off or disposed of in any other suitable manner. While the sheath is being drawn along the top of the dash, the moulding is impelled forward by the key or stop, and consequently no strain is brought to bear upon the flaring end of the moulding. "It is evident," says the patentee in the last sentence of the specifications, "that this form of sheath may be advantageously employed for attaching sheet-metal mouldings or tubes to various articles, and I reserve the right to use it for any and every purpose that it is capable of."

The first claim is "a sheath for applying metallic mouldings, said sheath being furnished with a stop for advancing the moulding, all substantially for the purpose specified." The second claim is for the sheath described in the specification, furnished with recesses and a key, or their equivalent stops, as and for the purpose explained. The third claim is for a sheath composed of two grooved bars, held to their places by bolts or screws and washers or fillings, whereby it may be adjusted to mouldings of different diameters. The fourth claim is for the combination of the grooved bars forming the sheath, and guttered hook or shackle described in the specification, for the object stated. The third and fourth claims need not be considered. None of the sheaths used by respondents contained washers, or any substitutes or equivalents therefor, whereby they were rendered capable of adjustment to mouldings of different diameters, and it was admitted on the hearing that there was no infringement of the fourth claim.

The respondent's evidence establishes that as early as September, 1867, Joseph P. Noyes, a manufacturer of combs at Binghampton, New York, used a machine for putting mouldings on combs, in which the moulding was held in a sheath fitting it closely, and having an extension enough smaller to fit the comb. In this extension there was a sliding follower fitted to abut against the end of the comb. At the extreme opposite end of the larger part of the sheath there was a slot across the sheath, containing a key or stop to prevent the sliding of the moulding. The follower was attached to a slide and lever, so that when a moulding was laid in the larger part of the sheath and the comb in the smaller part, the comb, being prevented from bending by the walls of the sheath, could be forced into the moulding by the action of the slide and lever upon the follower, the moulding being prevented from bending by the walls of the part of the sheath within which it was placed. This machine was in use more than three years before the date of the complainant's invention. That this was a comparatively small machine, and used only for applying mouldings to combs, is not material. *Planing Mach. Co. v. Keith*, 101 U. S. 490. Nor is it material that the groove or gutter was so open in cross section that the moulding could be dropped into it. Figure 6, of the drawings

accompanying the letters patent issued to complainant, shows a sheath of like shape, and is referred to in the specifications as a modified form of the sheath patented, and the claim is so broad as to cover any sheath, of any material, shape, or size, for applying mouldings to any article.

There is nothing more in the sheath patented to the complainant than an adaptation of the sheath used at Binghamton to the application of mouldings to carriage dash-boards; an adaptation which would have occurred to a skilled mechanic without the exercise of the inventive faculty. Had the complainant's invention been first in time and patented, the Binghamton sheath would have been an infringement; and, conversely, had the Binghamton sheath been patented, the complainant's would have been an infringement. That which infringes, if later, would anticipate, if earlier. *Day v. Bankers' & Brokers' Tel. Co.* 9 Blatchf. 345; *Buzzell v. Fifield*, 7 FED. REP. 465.

The bill is dismissed at complainant's costs.

BUTLER and others v. SHAW.

(Circuit Court, D. Massachusetts. August 20, 1884.)

1. PATENTS FOR INVENTIONS—INTERFERENCE PROCEEDINGS—DECISION OF COMMISSIONER OF PATENTS—HOW REVIEWED—REV. ST. § 4915.

From a decision of the commissioner of patents upon an interference no appeal lies to the supreme court of the District of Columbia, and the only remedy is by a bill in equity in the United States circuit court, under Rev. St. § 4915, to review the proceedings in the patent-office.

2. SAME—COSTS.

The last clause of section 4915 of the Revised Statutes, requiring the applicant to pay all the expenses of the proceeding, whether the final decision is in his favor or not, is limited to cases in which there is no opposing party other than the commissioner of patents, and whenever there are opposing parties, as in a contested case of interference, the ordinary rule should be followed, and costs be awarded to the party prevailing.

3. SAME—BUTLER IMPROVED MILK-CAN—ANTICIPATION—SHAW CAN.

The first claim of the patent applied for by Francis G. Butler, on November 20, 1878, for an improved milk-can, held not anticipated by the original patent granted to Philander Shaw, on September 10, 1878, for an improvement in milk-cans, and that while Butler was not entitled to a patent on his third claim, he was entitled to a patent for the invention specified in his first claim, and to the costs of this suit.

In Equity.

W. E. Simonds, for complainants.

J. J. Coombs, for defendant.

Before GRAY and NELSON, JJ.

GRAY, Justice. This is a bill in equity under section 4915 of the Revised Statutes, filed in this court on August 16, 1882, by Francis G. Butler, a citizen of Connecticut, and the Vermont Farm Machine v.21f,no.5—21

Company, a Vermont corporation, as his assignee, against Betsey H. Shaw, a citizen of Massachusetts, assignee of Philander Shaw, to obtain an adjudication that Butler is entitled to a patent for improvements in milk-cans, which has been refused him by the commissioner of patents, upon an interference declared between him and the defendant.

The case cannot be well understood without an abstract of the proceedings in the patent-office, copies of which have been submitted to us, and which were in substance as follows:

On September 10, 1878, a patent was issued to Philander Shaw, on an application filed by him on February 4, 1878. The apparatus described in the specification of that patent was as follows:

"A milk can, *a*, is closed at the top by a hollow float, and has at the upper end of the side a transparent pane of glass, through which the formation of the cream and its depth can readily be ascertained. The milk-can, after being filled with milk, is placed in a water-jacket, *i*, surrounded on its sides and bottom with a hollow closed receptacle, *l*, into which steam and cold water are alternately introduced; the steam, at the side of the receptacle, by a pipe leading from an ordinary heater, *m*, so as to raise the temperature of the milk to about 130 deg. Fahrenheit, at which temperature cream is most rapidly separated; and the cold water at the bottom of the receptacle, by the force of gravity, through a delivery pipe from an ordinary water-cooler, *p*, so as to cool the milk gradually from below, prevent downward currents in the milk, and thus form cream more quickly and in greater proportion than in ordinary open cans. Within the can is a tube, *d*, rising to about two-thirds of the height of the can, and the lower end of which projects through the side of the can near the bottom, and is there provided with a suitable stop-cock. Closely fitted into the upper end of this tube is another tube, *f*, open at both ends, which can be adjusted up and down, so as to draw off the cream at the level of its junction with the milk, and which has attached to its upper end a graduated scale, *g*, and an indicator, *h*, opposite the glass pane, so as to show the depth of the cream, and how much is drawn off."

The claims in that specification were as follows:

"(1) The herein described apparatus for obtaining cream from milk, consisting of the milk-can, *a*, the water-jacket, *i*, the closed receptacle, *l*, the heater, *m*, and the cooler, *p*, as set forth.

"(2) The herein described milk-can, *a*, for raising cream, in combination with the telescopic tubes, *d*, *f*, the graduated scale, *g*, and the indicator, *h*, as and for the purpose set forth."

On November 20, 1878, Butler filed an application for a patent, in which, as afterwards amended to meet objections of the examiners, he described a milk vessel, with a pane of glass near the top of sufficient length; vertically, to show the height of the cream raised upon the milk; and with an outlet at the bottom opening into a discharging tube or faucet, turning on a center pin or arbor, and adjustable so as to bring its discharging mouth at a height above the bottom of the can, equal to the depth of the layer of cream, and automatically discharge all the milk, leaving the cream in the can; and made two claims, the second of which is not now insisted on, and requires no further mention, and the first of which was as follows:

"(1) A milk vessel, having an adjustable faucet that can be set to automatically discharge any predetermined quantity of milk, to leave in the vessel a certain quantity of cream, and provided with a glass pane to ascertain the degree or place of adjustment of the faucet."

On April 12, 1879, the examiner rejected this first claim in Butler's application, on the ground that its subject-matter had been anticipated by the patent already granted to Shaw. Butler thereupon asked that an interference might be declared between his application and that patent. An interference was declared between Butler's first claim and Shaw's patent upon this claim or issue:

"A can for milk and cream separation, having an adjustable automatic discharge faucet, and a transparent pane by which the place or degree of faucet adjustment may be determined."

In the interference proceedings, Butler stated that in November, 1876, he conceived and practically tested the invention of such a can as described in this issue. Shaw stated that in March, 1876, he embodied his invention in a model; and on April 5, 1880, (Shaw having died in September, 1879,) Mrs. Shaw, at the suggestion of the examiner, filed an application for a reissue, repeating the description and the claims of Shaw's original patent, and inserting a new claim in the words of this issue.

The examiner of interferences decided that Shaw was the prior inventor. On appeal by Butler from that decision to the board of examiners in chief, one of them was in favor of affirming it. But the majority of the board held that the reissue application had materially enlarged the scope of Shaw's claim, and had brought in objectionable new matter to make a conflict, when none existed in fact, between the two devices; that Shaw's other claims covered his real invention and all that he was entitled to; that Butler's first claim was limited to the device which he had invented, and in no way trenched upon the invention of Shaw; that Shaw's device was for separating cream from milk, by drawing off the cream from the top of the milk, leaving the milk in the can, and could not be used to draw off the milk and leave the cream; and Butler's device was for separating milk from cream, by drawing off the milk at the bottom, leaving the cream in the can, and could not be used to draw off the cream and leave the milk; that the two devices were mechanically different, having no feature in common, except the glass panes and the indicators, which were well known, and not patentable by either; that an interference had been declared, and the parties had been contending, on a matter which one had not claimed and which neither was entitled to; and therefore recommended that the interference be dissolved and the case be remanded to the primary examiner, with instructions to reject Shaw's new claim and allow the parties to take patents on their other claims, unless some good reason could be shown for rejection on further examination.

From the decision of the board of examiners Mrs. Shaw appealed

to the commissioner of patents in person, who, on September 2, 1881, made the following decision :

"The claim at issue between the parties to this controversy reads as follows: 'A can for milk and cream separation, having an adjustable automatic discharge faucet, and a transparent pane by which the place [or degree] of faucet adjustment may be determined.' Priority of invention is the only question to be determined. While it is true that the devices of the respective parties are different, in principle they are the same, and both are within the terms of the issue. The evidence shows that Shaw completed a model of his invention in March, 1876. Whether the date written upon the model is the correct one or not, is immaterial in this case, as it clearly appears that sometime during that month the model was completed. Butler claims to have conceived his invention in November, 1876. He reduced it to practice in January or February following. I find nothing in the testimony showing an abandonment of invention on the part of Shaw; and as the dates above mentioned show that he was the prior inventor, I affirm the decision of the board of examiners in chief, awarding him priority of invention."

From the terms of that decision, it would appear that the learned commissioner wholly overlooked the decision of the majority of the board of examiners in chief, and the fact that Mrs. Shaw alone had appealed from that decision, and treated the case as if the decision of the dissenting examiner had been the decision of the board, and as if Butler had been the appellant.

Pursuant to that decision of the commissioner of patents, a reissue was granted on October 18, 1881, to Mrs. Shaw, containing the new claim.

On September 27, 1881, the primary examiner took up Butler's original application, and decided that, in view of the adverse decision in the interference, his first claim should be erased. On October 3d, Butler requested a reconsideration of that claim, and also amended his application by adding a third claim in the words of the declaration of interference. On October 14th, the examiner decided that Butler could not be allowed this claim, because it was the subject-matter of the interference finally decided against him. On October 28th, Butler requested a reconsideration of the rejection of his first and third claims, and on November 2d the examiner again rejected both of them. On December 2d, Butler appealed from this decision to the board of examiners in chief, who, after pointing out that their former decision on the interference did not award priority to Shaw, as the commissioner of patents had assumed, and expressing an opinion that the reissue of Shaw's patent, when construed in the light of his specification, drawing, and model, would not preclude Butler from being allowed his first claim, concluded thus :

"Yet the former examiner having held that the old patent of Shaw authorized the making of the above third claim, and that said third claim covered the matter of the first claim, and the commissioner having virtually decided priority in favor of Shaw, we will *pro forma* affirm the action of the examiner now in charge, and let the matter go before the commissioner for disentanglement and adjudication."

From this decision of the board of examiners Butler appealed to the commissioner of patents in person; and on December 28, 1881, the acting commissioner affirmed the decision, for these reasons:

"In their decision in the interference proceeding, the board of examiners in chief made substantially the same suggestion with reference to certain differences existing between Butler and Shaw, which they now make in the *ex parte* proceeding. These differences were recognized by the commissioner, but it was finally held, after careful consideration, that, notwithstanding these differences, the claims of the parties, as therein presented, were substantially identical. The first claim now appealed is the claim that was involved in the interference referred to, and the third claim is drawn up in the very language of the issue in that case. The questions presented by these claims are therefore *res adjudicata*, and clearly cannot be reopened in an *ex parte* proceeding upon the suggestion of the defeated party. The applicant must therefore be finally rejected, upon reference to the adjudication in the interference case of *Butler v. Shaw*."

The defendant has introduced in evidence a patent issued to Butler on January 31, 1882, on another application filed by him on November 8, 1881, the specification of which described the apparatus as in his first application, and the claim in which was as follows:

"The within described method of separating cream from the milk from or upon which it shall have been raised, which consists in first ascertaining, as set forth, the quantity or depth of cream raised in the vessel, and then adjusting a discharge faucet to the desired point and withdrawing the milk from beneath the cream, leaving such predetermined quantity of cream within the vessel."

No copies of the proceedings in the patent-office upon that application having been submitted to us, we are not informed of the grounds upon which Butler was granted a patent for the method, while he was refused a patent for the machine in which the method was embodied.

At the argument before this court, the defendant contended that Shaw was rightly awarded priority of invention upon the claim stated in the declaration of interference; that if Shaw was not entitled to that claim, Butler was not; that if Butler was entitled to his first claim, he had mistaken his remedy, by filing a bill in equity in this court to review the decision of the commissioner of patents upon the interference, instead of appealing to the supreme court of the District of Columbia from the final rejection of this claim by the acting commissioner; and that he was precluded from now asserting this claim by having taken out the patent of January 31, 1882.

The proofs before us clearly show that Butler was the first inventor of the device described in his first claim for drawing off the milk, leaving the cream in the can; that Shaw's invention was limited to the device which he described for drawing off the cream, leaving the milk; that the two inventions differed in mechanical construction and in practical operation; and that neither was broad enough to include both.

It follows that the proceedings in the patent-office were erroneous in the following particulars: (1) The decision of the examiner, on April 12, 1879, rejecting the first claim in Butler's application, on the ground that its subject-matter had been anticipated by Shaw's original patent. (2) The declaration of interference between Butler and Shaw on an issue broader than either had theretofore pretended to claim, or was entitled to. (3) The final decree of the commissioner of patents, on September 2, 1881, in the interference, awarding priority of invention to Shaw upon that issue. (4) The reissue of Shaw's patent with a corresponding claim.

But after the decision of the commissioner of patents in favor of Shaw upon the broad claim stated in the declaration of interference, and the reissue of Shaw's patent with that claim inserted accordingly, the commissioner of patents had no authority to revise that decision, or to revoke the reissue. Butler's remedy was by resort to the courts.

That decision of the commissioner of patents, so long as it stood, if it did not (as the acting commissioner afterwards held that it did) operate as an adjudication precluding Butler from being allowed his first claim, yet would, so far as the action of the patent-office had any effect, make a patent, if afterwards granted to him for that claim, subordinate to the broader claim so allowed to Shaw.

An appeal by Butler to the supreme court of the District of Columbia from the later decision of the acting commissioner, on December 28, 1881, rejecting his application, would not, therefore, afford him an adequate remedy. In order to obtain complete relief, he must have the decision of the commissioner of patents upon the interference reviewed; and that can only be done by bill in equity in a circuit court of the United States. From the decision of the commissioner of patents upon an interference, no appeal lies to the supreme court of the District of Columbia, and the only remedy is by bill in equity. It is only in other cases of rejection by the commissioner of an application for a patent, that an appeal may, perhaps must, be taken to the supreme court of the District of Columbia, and be decided by that court against the applicant, before he may file a bill in equity. Rev. St. §§ 629, 711, 4911, 4915.

When an applicant for a patent appeals from the rejection of his application by the commissioner of patents to the supreme court of the District of Columbia, that court acts strictly as a court of appeal in the matter of granting patents; the commissioner of patents is the appellee, and notice to parties interested is given through him; the hearing is summary, and is confined to the specific reasons of appeal, and to the evidence produced before the commissioner; and it is expressly provided that "no opinion or decision of the court in any such case shall prevent any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question." Id. §§ 4913, 4914. But a bill in equity in a circuit court of the United States, under section 4915,

by a party against whom an interference has been decided by the commissioner of patents, is a suit within the ordinary jurisdiction in equity of the courts of the United States; the court itself gives notice to adverse parties; the statute contains no provision requiring the case to be heard upon the evidence produced before the commissioner, or restricting the effect of the decree; and, as has been held in this and other circuits, the court may receive new evidence, and has the same powers as in other cases in equity. *Whipple v. Miner*, 15 FED. REP. 117, before LOWELL, J.; *Ex parte Squire*, 3 Ban. & A. 133, before TREAT, J., and *Atkinson v. Boardman*, before Mr. Justice NELSON, there cited. Doubtless, upon general principles, and in accordance with the rule expressly declared in section 4918 in the case of a similar bill between parties interested in interfering patents, the judgment cannot affect the right of any person except the parties to the suit, and those subsequently deriving title under them.

The question now before us, however, is not, what effect an adjudication in this case in favor of the complainants may have in future suits, but whether the commissioner erred to their prejudice in his decision upon the interference; and, for the reasons already stated, that decision was erroneous in awarding priority of invention to Shaw upon the broad claim stated in the declaration of interference, to the detriment of Butler's first claim, on which he was clearly entitled to a patent.

The position of the defendant, that Butler is precluded, by having taken out the patent of January 31, 1882, from now asserting his first claim, cannot be sustained. The application for that patent was filed by Butler after the decision against him upon the interference, and after repeated rejection by the primary examiner of his first and third claims. His object in filing it evidently was to secure so much of his invention as the patent-office was willing to allow to him, without intending to abandon his effort to procure a reversal of its action in other respects. After the filing of his last application, he continued diligently to prosecute his appeal to the board of examiners and to the commissioner of patents from the rejection of his former application; and the present bill to review the adverse decision of the commissioner upon the interference was filed within a year after that decision was made. Under these circumstances, no intention to abandon the claims asserted in the bill can be inferred from his having meanwhile applied for and taken out the patent of January 31, 1882. *Suffolk Co. v. Hayden*, 3 Wall. 315; *Adams v. Jones*, 1 Fisher, Pat. Cas. 527; *Graham v. McCormick*, 10 Biss. 39; *McMillin v. Rees*, 5 Ban. & A. 269.

The question of the validity of that patent is not presented by this bill. Nor is it necessary, for the decision of this case, to consider the question, strongly contested at the bar, whether Shaw's invention was prior in time to Butler's. Neither of those questions, therefore, is passed upon or concluded by this opinion.

The last clause of section 4915 of the Revised Statutes, requiring the applicant to pay all the expenses of the proceeding whether the final decision is in his favor or not, is, in manifest intention, if not by unavoidable construction, limited to cases in which there is no opposing party other than the commissioner of patents, and in which, therefore, the costs, if not paid by the applicant, would fall upon the commissioner, and upon the government whose officer he is. Whenever there are opposing parties, as in a contested case of interference, the ordinary rule should be followed, and costs be awarded to the party prevailing.

The result is that while Butler is not entitled to a patent on his third claim, there must be a decree that he is entitled, according to law, to receive a patent for the invention specified in his first claim, and for costs. Decree for the complainants accordingly.

FORNCROOK v. ROOT.¹

(Circuit Court, N. D. Ohio. 1884.)

1. PATENTS—SECTIONAL HONEY-FRAMES.

Patent No. 243,674, granted to James Forncrook for an improvement in sectional honey-frames, *held* void for want of novelty.

2. SAME—SPECIFIC MECHANISM.

Whether such patent is for a honey section containing a combination of all the elements specified, so that each element has been made material, *quære*; but *held*, that the patent is not merely for the *blank* adapted for the construction of the honey section by simply bending and uniting the ends, but also embraces the *honey-frame*, as thus formed and made out of such blank.

In Equity.

Wm. P. Wells, for complainant.

J. A. Osborne, for defendant.

MATTHEWS, Justice. This is a bill in equity to restrain the alleged infringement of letters patent No. 243,674, granted June 28, 1881, to the complainant, James Forncrook, of Watertown, Wisconsin, for a new and useful improvement in sectional honey-frames, and for an account, etc.

The claim of the patent is as follows:

"As a new article of manufacture, a blank for honey-frames formed of a single piece of wood having transverse angular grooves, *c*, longitudinal groove, *d*, and recesses, *b*, all arranged in the manner shown and described."

As set out in the specifications,—

"This invention relates to an improvement in sectional honey-frames, the object being to so construct them that they shall be stronger and in a more portable form than the frames now used for such purposes; and the inven-

¹ Reported by J. C. Harper, Esq., of the Cincinnati bar.

tion consists, essentially, in forming the frame from a single blank or piece of material having all the necessary grooves and recesses required to form a complete frame cut in it, the ends of the blank being notched or dentated, and angular grooves cut across it at those points which are to form the corners. These blanks, after being thus prepared, may be packed solidly in boxes or otherwise for transportation, and when required for use are bent into the square form, and their ends united at one of the corners by means of the interlocking notches or teeth, thus forming a complete frame, ready for use."

It is further stated that—

"The blanks for these frames are preferably formed from some light, tasteless, and comparatively tough wood, which will bend at the corners without steaming or boiling, such as basswood or whitewood; the material being produced by cutting it from the log in the form of a thick veneer, or by sawing into thin stuff and then planing both surfaces. The blanks are then cut from this material, of the proper width and length, and the ends dentated, as shown at *a, a*, by means of a series of circular saws placed close together upon an arbor or other suitable tool, so that they will interlock when brought together. The recesses, *b, b*, are then formed in its edges at such points in its length as will bring them at the top and bottom of the frames when set up in the hive. These recesses form openings, which allow space for the passage of the bees between the frames, and for the ventilation of this part of the hive. Three triangular grooves, *c, c, c*, are then cut across the blank at such points in its length as will divide it into four nearly equal parts, each of which forms one side of the frame after the blank is bent into a quadrangular shape. These triangular grooves are cut nearly through the blank, sufficient wood only being left to hold the parts firmly together. As the sides of the grooves, *c*, are inclined towards each other at a right angle, it follows that, when the blank is bent into the form of a frame, these grooves make perfectly fitting miter-joints at three of its corners, the fourth corner being that at which the ends of the blank are united to each other by means of the interlocking teeth formed thereon. In one of the spaces between two of the grooves, *c*, and preferably that which will form the top of the frame when placed in the hive, is formed a longitudinal groove, *d*, for the guide-stiip, which makes a secure point of attachment for the comb when the bees begin to build in the frames set side by side in the hive with the parts of the frame containing the recesses, *b, b*, at top."

"These frames," it is added, "meet a want long felt by bee-keepers, as those in common use are either dovetailed or nailed together at the corners; and if set up at the manufactory, form a large bulk for transportation, and are very liable to breakage in handling; but if sold to the user in pieces to be put together by him, the numerous joints to be made cause loss of time, and produce a very fragile article when finished, which loses its rectangular shape with the slightest rough usage, as the joints at the corners lack the necessary strength and rigidity to hold them in shape."

"My frame," the specification continues, "will be found to possess none of the above-named defects, as it is intended for transportation in solid packages before being set up, and when set up possesses great strength and rigidity, preserving its form without difficulty during all the rough handling to which such frames are frequently subjected."

The defendant denies infringement, and alleges want of patentable novelty in the alleged invention.

It is admitted that the defendant manufactures and sells blanks for honey-frames like those of the complainant, in all respects but one. They omit the longitudinal groove for the guide-strip, for attaching a piece of comb as a beginning point for the work of the bees. It is claimed by the defendant that this omission is sufficient to distinguish his manufacture from that described in the patent, as it is contended that the patent is for a honey section containing a combination of all the elements specified in the patent, so that each element, by force of the patent, has been made material to the alleged invention described and secured thereby. It is insisted, however, on the other hand, that this is a misconception of the invention patented, and that "the patent," to use the language of counsel, is for "the construction of a blank completely adapted to form a honey section ready for immediate use by simply bending it into shape and joining its ends;" that is, the patent is not for a honey section with all the features enumerated, considered as a combination, but for the blank adapted for its construction by simply bending and uniting the ends. Conceding this to be the true meaning of the claim, it is necessary, to support the patent, to consider it as embracing the honey-frame as thus formed and made out of such a blank; for supposing the frame or section not to be covered by the patent, would leave, as included in and covered by it, merely the idea of leaving the blank in its condition as such, for the purpose of more convenient packing and transportation, to be formed by bending together and uniting its ends, by the purchaser for use, into a honey-frame. The embodiment of that single idea can hardly be supposed to be the proper subject of a patent. It is merely the adoption of a form for handling and packing, which is not regarded by the statute as an improvement in an art or manufacture. If the patentee is entitled to claim the blank as a new and useful device, it is because it is a constituent of the frame or section into which it is formed by bending, no matter who bends it, whether the maker or the purchaser for use. And if the state of the art, at the date of the alleged invention, was such that the patentee cannot claim as his invention the honey frame or section when formed by bending and uniting the ends of such a frame, then he cannot, for the same reason, claim as his invention such a blank for the purpose of forming it into a frame or a section.

The question, therefore, is whether, upon the evidence at the date of the alleged invention, the manufacturer of honey frames or sections, by bending and uniting the ends of a blank consisting of a single piece, substantially as described in this patent, was a patentable novelty. Upon a careful comparison, and consideration of all the evidence, this question must be answered in the negative. Alexander Fiddes testifies to making and using honey sections formed from a single piece, grooved, bent, and united at the ends, as early as 1872

and 1873, some of which he sold to others for use; and if those now made by the complainant, under his patent, are superior in any respect to those first specimens of the manufacture, it is merely in point of finish and workmanship. There is no difference whatever in principle, and the early examples were complete and practical frames, actually used, and perfectly serving the purpose, so that they cannot be considered as rude and imperfect experiments, subsequently developed into a successful manufacture.

This conclusion, indeed, is required by the production in evidence of the patent granted to Hutchins, of December 8, 1874, No. 157,473, which is for a machine for the manufacture of just such blanks from the original log of wood, to be bent into form, and the ends united, so as to make the sides of a box for any purpose. The invention of such a machine, of course, supposes knowledge of the blanks it was designed to manufacture; and the transfer of the use of a box made from such a blank, from the ordinary purposes to the simple and special purpose of a box or frame for a honey section, is merely a new use of an old and well-known article, which involves no invention.

It results from these views that the equity of the case is with the defendant, and that the complainant's bill must be dismissed, with costs; and it is so ordered.

UNITED STATES v. BURLINGTON & HENDERSON COUNTY FERRY CO.

(District Court, S. D. Iowa. June Term, 1884.)

1. CONSTITUTIONAL LAW—NAVIGABLE WATERS OF UNITED STATES.

Rivers are navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable rivers of the states, when they form in their ordinary condition by themselves, or by uniting with other rivers, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water.

2. SAME—NAVIGABLE WATERS OF A STATE.

A lake or river which is completely within the limits of a state, without any navigable outlet to any other state or country, is a navigable water of the state not within the jurisdiction of the federal government.

3. SAME—JURISDICTION OF FEDERAL COURTS—HOW CONFERRED.

In order to give jurisdiction to a federal court in any case whatever, the constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the constitution or the law; the two must co-operate: the constitution as the fountain, and the laws of congress as the streams from which and through which the waters of jurisdiction flow to the court.

4. SAME—ADMIRALTY JURISDICTION EXCLUSIVE—STATE LAW CREATING OR ENFORCING MARITIME LIENS.

The admiralty jurisdiction of the federal courts is exclusive, and all state laws creating maritime liens, or jurisdiction *in rem* to enforce such liens, are unconstitutional and void.

5. SAME—REGULATION OF COMMERCE.

The admiralty jurisdiction of the courts of the United States cannot be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants.

6. SAME—NAVIGABILITY AS TEST OF JURISDICTION—VESSELS ENGAGED IN DOMESTIC COMMERCE.

Navigability being the test of admiralty jurisdiction, the true doctrine now is that the admiralty jurisdiction of the United States courts extends to all vessels navigating the waters of the United States, whatever may be the character of the commerce in which they are engaged, whether foreign, interstate, or completely internal to the states.

7. SAME—POWER OF CONGRESS TO REGULATE NAVIGATION.

Congress has power to regulate by law the navigation of boats and vessels floating in the navigable waters of the United States when engaged exclusively in the domestic commerce of the states.

8. SAME—VIOLATION OF REV. ST. § 4466—FERRY-BOAT—EXCURSION BETWEEN PORTS IN SAME STATE—MARITIME TORT—LIBEL *IN PERSONAM*.

A boat or vessel plying between two ports in the same state, upon any navigable water of the United States, but engaged exclusively in the domestic commerce of the state, is within the admiralty jurisdiction of the United States, and when a steam ferry-boat, contrary to the provision of Rev. St. § 4466, carries passengers on an excursion, largely in excess of the number allowed by her permit, and fails to carry the required number of life-preservers, she is guilty of a maritime tort, and a United States district court has jurisdiction of a libel *in personam* against her owners and master to recover the penalty prescribed by section 4500.

This is a proceeding in admiralty, by information filed by the district attorney against the defendants *in personam*, charging them, as owners and master of the steamer John Taylor, with the violation of the laws of the United States regulating steam-vessels. That law provides in substance, among other things, that all passenger steam-vessels navigating any waters of the United States, etc., engaging in excursions, shall obtain from the inspector a special permit in writing for the occasion, in which the number of passengers that may be carried, and the number and kind of life-preservers, shall be stated, etc. The statute further prescribes a penalty of \$500 for the violation of said provision. Rev. St. §§ 4400, 4466, 4500.

It is alleged in the libel that the said John Taylor was a boat propelled by steam, and that said steamer violated said provision, in the fact that she carried passengers largely in excess of the number allowed by her permit, and that she failed to carry the required number of boats and life-preservers. The defense set up is—*First*, that the boat, upon the excursion in question, carried citizens of the city of Burlington, Iowa, only, upon the Mississippi river from that city to another place in the state of Iowa, within the same county in which said city is situated, and that the transaction in question in nowise appertained to commerce with any other state than the state of Iowa, but that it was a transaction connected solely and exclusively with the domestic intercourse of said state; *second*, that the boat was not a passenger steamer, but a steam ferry-boat, plying between said city of Burlington and the Illinois shore, and that as such she is exempted from the penalty prescribed by the statute.

John S. Runnells, Dist. Atty., and William T. Rankin, for libelant.
Newman & Blake, for respondents.

LOVE, J. It thus appears that the boat in question was propelled by steam, and that she was engaged in navigating the Mississippi

river, carrying passengers from one place in the state of Iowa to another place in the same state. It does not appear that she was engaged in any interstate commerce whatever. "Commerce," says the supreme court of the United States in *Gibbons v. Ogden*, 9 Wheat. 1, "is more than traffic: it is intercourse;" and the carrying of passengers is commercial intercourse. The navigation in question was within a "water of the United States," as contradistinguished from "a water of the states;" but the commerce in which the boat was engaged was "completely internal" to the state of Iowa. Such being the facts, the counsel for the respondents contend that the case is not within the jurisdiction of the district court of the United States. It is necessary, in the decision of this case, to keep clearly in view the definition of the terms "waters of the United States," as given by the supreme court of the United States. In *The Daniel Ball*, 10 Wall. 563, the supreme court say that our rivers are "navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable rivers of the states, when they form in their ordinary condition by themselves, or by uniting with other rivers, a continued highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which commerce is conducted by water." Within this definition the court has held the Fox river, and also the Grand river, a small navigable stream wholly within the state of Michigan, flowing into Lake Michigan, to be a "navigable water" of the United States. See, also, *The Montello*, 11 Wall. 411, and particularly the same case, 20 Wall. 430. In *Ex parte Boyer*, 109 U. S. 629, S. C. 3 Sup. Ct. Rep. 434, the supreme court approved the *dicta* of these cases, and held that the Illinois and Michigan canal, though a water-way wholly artificial, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction. It follows that a lake or river which is completely within the limits of a state, without any navigable outlet to any other state or country, is a navigable water of the state not within the jurisdiction of the federal government. It thus appears that the so-called waters of the United States include navigable streams without number; indeed, the whole river system of our country, where navigation exists with a flowage to the sea, or either directly or indirectly from one state to another. Now, suppose a boat or vessel to be plying between two ports in the same state upon any navigable water of the United States as thus defined, but engaged exclusively in the domestic commerce of the state, is she within the admiralty jurisdiction of the United States? Counsel insist that she is not. Is it, then, the character of the river, as a navigable water of the United States, or the particular kind of commerce in which the boat is engaged, that determines the jurisdiction? That the boat, in the case now before the court, was locally within the admiralty jurisdiction of this court, there is, of course, no doubt whatever, for she was afloat upon the Mississippi river. But counsel contend that the

"subject-matter" as well as the locality must be taken into account in determining the jurisdiction; that the boat in question was employed exclusively in the domestic commerce of the state of Iowa; that she was not, therefore, within the grant of power to congress to regulate commerce among the states, which is the only source of power in the constitution applicable to the case.

It will be seen, as we proceed, that the argument of counsel would have had great, perhaps conclusive, force, if it had been made prior to the decision of the supreme court in the case of *The Genesee Chief*, 12 How. 443, in the year 1851. That decision, it is well known, worked a great change in the jurisdiction of the federal courts with respect to cases growing out of the navigation of the rivers of the United States above tide-water. The effect of that decision will be presently considered.

In order to give jurisdiction to a federal court in any case whatever, the constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the constitution *or* the law. The two must co-operate; the constitution as the fountain, and the laws of congress as the streams from which and through which the waters of jurisdiction flow to the court. This results necessarily from the structure of the federal government. It is a government of granted and limited powers. All powers not granted by the constitution to the federal government nor prohibited to the states are reserved to the states or the people. The great residuum of legislative, executive, and judicial power remains in the states. With respect to the federal government, the question always is, what powers are granted? with regard to the states, what powers are prohibited? There are in the federal constitution two distinct and independent provisions touching the subject of navigation and commerce. Article 1, § 8, as follows: "Congress shall have power to regulate commerce with foreign nations, and among the several states and among the Indian tribes," etc. Article 3, § 2: "The judicial power shall extend to all cases of admiralty and maritime jurisdiction," etc.

For more than 50 years after the organization of the American courts it was the received doctrine that admiralty jurisdiction was limited to tide-water. This doctrine was inherited with the law of admiralty from the mother country. It received the sanction of the supreme court of the United States in the year 1825, in the case of *The Thomas Jefferson*, 10 Wheat. 428. The flow of the tides is well adapted to measure the necessity of admiralty jurisdiction in England, where navigation and tide-water are practically co-extensive. But with the vast expansion of commerce by steam navigation upon our great tideless lakes and far-flowing rivers, it became in time apparent that the flux and reflux of the tides as a test of admiralty jurisdiction was wholly unsuited to the necessities of commerce and navigation in this country. It was like an attempt to clothe a giant

with garments adapted to the form of a dwarf. Hence the decision of the supreme court of the United States in *The Genesee Chief*, 12 How. 452. This decision was rendered in 1851. It wholly overruled *The Thomas Jefferson*, and established the doctrine that henceforth navigability, not tide-water, was to be the true test of admiralty jurisdiction in this country. The result of this decision was to extend the admiralty jurisdiction of our courts over all the navigable waters of the United States. The court, in this case, also distinctly repudiated the doctrine that admiralty jurisdiction depends upon the commercial power of the constitution. The court say:

"Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants." See 12 How. 452.

It is manifest that prior to the decision in *The Genesee Chief* there was apparently but one source of federal jurisdiction over commerce and navigation above tide-water, namely, the power of congress to regulate commerce among the states. The supreme court, in *Gibbons v. Ogden*, 9 Wheat. 217, held that navigation is necessarily involved in maritime commerce, and therefore that congress was fully competent to pass laws regulating the navigation of vessels engaged in interstate commerce; but the court traced the power to regulate navigation to the power to regulate commerce. The court at the same time held that the power to regulate interstate commerce does not comprehend that commerce which is completely internal to the states. It is a necessary inference that congress had no power, as the law was understood prior to the decision in question, to regulate navigation above tide-water when it was concerned exclusively with the domestic commerce of the states, even when the vessel carrying it on was afloat in the navigable waters of the United States. But whoever will take the pains to examine the decisions of the supreme court subsequent to *The Genesee Chief* will find a marked change in the course of judicial thought in that tribunal with respect to navigation above tide-water. It is apparent that a new source of jurisdiction above tide-water was discovered. It became necessary to take into view the clause of the constitution extending the judicial power of the United States to all questions of admiralty and maritime jurisdiction. The result, in my opinion, is that, navigability being the test of admiralty jurisdiction, the true doctrine now is that the admiralty jurisdiction extends to all vessels navigating the waters of the United States, as contradistinguished from the waters of the states, whatever may be the character of the commerce in which they are engaged, whether foreign, interstate, or completely internal to the states. All admiralty jurisdiction refers directly or indirectly to navigation. It is the vessel and its navigation, and the crimes, torts, and contracts growing out of it, that form the objects of admiralty jurisdiction. Commerce is only so far an object of admiralty jurisdiction

as it is connected incidentally with navigation. The admiralty has nothing whatever to do with commerce upon land; but it deals extensively with navigation for purposes entirely disconnected from commerce. Hence the law of admiralty was anciently called the law of the sea. That, with its present extension, would be a misnomer. It ought to receive a new baptism as the law of navigation and maritime commerce; navigability, not salt water, being now locally the test of its existence.

The law of congress having, in concurrence with the constitution, conferred upon the district courts original cognizance of "all cases of admiralty and maritime jurisdiction," it is material to inquire what are in general cases of admiralty and maritime jurisdiction. The general jurisdiction of the admiralty embraces maritime contracts, torts, and crimes. Crimes committed within the jurisdiction of the states being expressly excepted from the jurisdiction of the federal courts by the crimes act, we have no present concern with that class of cases. Rev. St. § 5339. The civil jurisdiction of the admiralty includes all marine contracts and torts. The subject-matter is the test of a marine contract. A contract appertaining to commerce and navigation, wherever made, to be performed on the navigable waters of the United States, is in general a marine contract. But with respect to marine torts the test is locality. This doctrine is settled by authorities too numerous for citation. *The Belfast*, 7 Wall. 637; *The Commerce*, 1 Black, 574; 2 Pars. Shipp. & Adm. 347. A marine tort certainly cannot be made to depend upon the kind of commerce in which the ship is employed. If a marine tort be committed anywhere upon a navigable water of the United States, whether the ship or vessel be engaged in commerce wholly domestic to a state or interstate, the case is one of admiralty and maritime jurisdiction. *The Commerce*, 1 Black, 570. See what is said by CLIFFORD, J., in delivering the opinion in *The Belfast*, *supra*, 670; and by Chief Justice CHASE in *The Mary Washington*, 5 Amer. Law Reg. 647, at bottom of page. See, also, *The Magnolia*, 20 How. 296. Suppose a collision of two vessels on the Missouri river, within the limits of that state, both employed in the strictly domestic commerce of the state, or one in such domestic commerce and the other in commerce with other states; would not the tort in either case be within the admiralty? Certainly; because the tort is marine, and the locality—the Missouri river—is within the admiralty jurisdiction of the United States.

Neither is the kind of commerce carried on by the vessel, whether interstate or intro-state, any test of a maritime contract. *The Belfast*, *supra*. In this case it was decided that a contract of affreightment for the transportation of cotton from a port in one state to a port in the same state is a maritime contract within the admiralty. The same was held in *The Mary Washington*, *supra*.

The general question is whether or not the vessels navigating the waters of the United States, but carrying on domestic trade of a state

exclusively, are within the scope of the admiralty jurisdiction? If, under such circumstances, the federal admiralty jurisdiction does not extend over the navigable waters of the United States to all cases of contract and tort growing out of the kind of commerce and navigation indicated, the suitor must be remitted for redress to the common-law jurisdiction of the local courts; for there is and can be no admiralty jurisdiction whatever, other than that of the United States, applicable to such cases. It is settled by many cases that the admiralty jurisdiction of the federal courts is exclusive, and that all state laws creating maritime liens, or jurisdiction *in rem* to enforce such liens, are unconstitutional and void. *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555; *The Belfast*, 7 Wall. 624; *The Lottawanna*, 21 Wall. 558. So strong is this principle of exclusive jurisdiction that it is now settled by *The Lottawanna* and other cases that where state laws create liens upon the boat not strictly maritime and within the admiralty,—such, for example, as a lien upon the boat for supplies in her home port,—the federal admiralty will recognize and enforce them, and that no state court can be clothed with power to enforce such liens by proceedings *in rem*. Thus the state courts are not only impotent to enforce general maritime liens, but they are equally inadequate to the duty of enforcing, by proceedings *in rem*, liens created upon the vessel by the legislative power under which they sit to administer justice.

Again, the admiralty jurisdiction above tide-water now stands upon exactly the same footing as the admiralty jurisdiction below tide-water and upon the sea-coast. The decision in *The Genesee Chief* has worked this result. If, therefore, the admiralty jurisdiction upon our rivers above the flux of the tides be excluded where the vessel, though floating in the waters of the United States, is engaged in strictly domestic commerce, I can see no good reason why it may not on the same ground be excluded upon the sea-board within the borders of the states, in cases where the vessel is employed in a commerce completely internal to the states. But no one, I think, would contend that a doctrine leading to such a result could be maintained. It is startling to think of the mischievous consequences of excluding all admiralty jurisdiction from so large a class of cases as must inevitably grow out of strictly domestic state commerce, upon the vast stretches of navigable water, both of the sea-coasts and lake and river shores, and remitting the parties for redress to the wholly inadequate remedies of the common law touching maritime injuries. For if, in such cases, the admiralty jurisdiction be excluded, the only remedies upon marine torts and contracts would be by actions *in personam* at common law, and by proceedings in attachment under the state statutes.

But, assuming that the class of cases just referred to is within the cognizance of the admiralty, it may be questioned whether or not the very case now before the court is one of admiralty and maritime

jurisdiction. The present case is a marine tort. It grew out of a transaction in the navigation of a vessel upon the Mississippi river in violation of an act of congress, which makes it an offense, and subjects it to a pecuniary penalty. It bears the test of all marine torts—locality.

The present case is, in my judgment, identical in principle with *The La Vengeance*, 3 Dall. 297. That case was, like the present, prosecuted by *ex officio* information, in the district court, against the French schooner *La Vengeance*, alleging that certain arms and ammunition were exported in that schooner, contrary to the act of May 22, 1794. The only question made was whether or not it was a civil cause, and a cause of admiralty and maritime jurisdiction. The court said they were perfectly satisfied that, in the first place, it was a cause of admiralty and maritime jurisdiction; that the exportation of arms and ammunition was simply the offense; and the exportation was entirely a water transaction. It commenced at Sandy Hook, which must have been upon the water. In the next place, the court was unanimous that it was a civil cause; it was a process in the nature of a libel *in rem*, and does not in any degree touch the person of the offender. The questions decided here were vital; because, if it was not a cause of admiralty and maritime jurisdiction, or not a civil cause, the trial must have been by jury; whereas, the court below decreed a forfeiture, sitting without a jury. "The point in this case," says Mr. Justice NELSON, delivering the opinion in *The Eagle*, 8 Wall. 26, "was contested in several subsequent cases, but the court adhered firmly to its first decision." *The Daniel Ball*, *supra*, was also, in principle, like the present case. It was a proceeding *in rem* to enforce penalties affixed by an act of congress for the violation of the act requiring the master or owner of the boat to take out license, etc. The court gave judgment against the boat, and must, therefore, have treated the penalty as a maritime lien upon the vessel. It is true that *The La Vengeance* and *The Daniel Ball* were cases of seizure. The proceeding in those cases was *in rem*; in the present case it is *in personam*. That, however, can make no difference in the question of jurisdiction. It is not by the form of the proceeding, but by the nature of the case, and the locality of the injury, that we must determine whether a tort is of common law or admiralty jurisdiction. In many cases in admiralty, where liens exist, the proceeding may be *in personam* or *in rem*, or in both simultaneously. Ben. Adm. §§ 204, 361, 362; Admiralty Rules 13, 14, 15; *Manro v. Almeida*, 10 Wheat. 473. All seizures upon land, for the violation of the revenue laws, are proceedings *in rem* after the course of the admiralty. All such cases are, nevertheless, common-law causes, triable by jury. The fact of seizure, therefore, is not decisive in determining the jurisdiction.

But counsel say that, even conceding that the admiralty jurisdiction extends over all the navigable waters of the Union, "it must be con-

fined to cases arising under the constitution; that is, that 'the thing charged must not only occur on navigable water, but the transaction itself must be one which the government has, under the constitution, the right to regulate.' The inference is that congress, under the power to regulate commerce among the states, has no authority to regulate navigation concerned exclusively with the domestic commerce of the states. The burden of this argument is that the power to pass laws regulating navigation is derived solely from the power to regulate commerce, and that where the vessel, though engaged in navigation upon the waters of the United States, is employed exclusively in the internal commerce of a state, the power of congress is not applicable to her navigation. This argument, I think, entirely confounds navigation with commerce, and ignores the fact that the former may exist as a thing entirely distinct from the latter. Moreover, it leaves out of view the consideration that the power of congress over navigation may be derived from the double sources of the commercial power and the admiralty power; in some cases from one power, and in other cases from both. Vessels may navigate the waters of the Union for the purpose of pleasure simply, or for warlike ends, or in the course of mere trial trips without the least view to commerce. In such cases there would be navigation without commerce, and would not the power of congress extend to the subject of their navigation as such? The power of congress to regulate navigation, therefore, is not wholly derived from the power to regulate commerce. There are other sources of legislative authority over the subject of navigation. May not the admiralty power be invoked as one of the sources of legislative authority over navigation in the public waters of the United States, whether it be concerned with foreign commerce or interstate commerce, or the strictly domestic commerce of the states, or trips for pleasure or trial trips? What are the subject-matters of admiralty jurisdiction? Maritime contracts, torts, and crimes; contracts to be performed and torts and crimes committed upon water in the course of or in connected with navigation. The constitution commits to a branch of the general government power over all cases of admiralty and maritime jurisdiction. May not congress, within the scope of this power, change, alter, or amend the law of marine contracts, torts, and crimes? May not congress, by virtue of the admiralty power, define anew what shall constitute a tort or crime in the navigation of a vessel upon the waters of the Union? Congress has in fact created numerous offenses against the laws of the United States upon the subject of "impost navigation and trade," which, when committed upon water in the course of navigation, fall within the admiralty jurisdiction. This has been the course of legislation from the earliest period of the government to our own day. Navigation is a special object of admiralty and maritime jurisdiction. Is not the national legislature competent under the admiralty power to declare what cases connected with navigation are of admiralty jurisdiction, and to create offenses

within that jurisdiction? *The La Vengeance, The Daniel Ball, supra.* In both of these cases penal offenses were created by the legislation of congress.

It may be said that marine commerce includes navigation, and therefore that congress may derive authority to pass navigation laws through the power to regulate commerce among the states. It is true that maritime commerce implies navigation, but not all kinds of navigation. If we deduce the authority of congress to regulate navigation exclusively from the power to regulate commerce, we must confine it to commerce with foreign nations, among the states, and with the Indian tribes. But since congress has power to regulate some kinds of navigation not within that category, we cannot deduce its legislative authority wholly from that source. Legislative authority in congress may, in some instances, be derived from more than one grant in the constitution, as a river may receive its waters through streams flowing from different sources. Thus the authority to build and equip vessels of war is, doubtless, implied in the power to "declare war," but the same authority is more directly conferred by the power to "provide and maintain a navy."

The question is whether or not congress has, under the constitution, power to regulate by law the navigation of boats and vessels floating in the navigable waters of the United States, when engaged exclusively in the domestic commerce of the states. The respondent's counsel answer this question in the negative, on the ground that the power of congress is restricted to the regulation of commerce among the several states. If the power of congress is not full and plenary over navigation in all the waters of the United States and over all vessels carrying on commerce upon the same, whether foreign, coast-wise, interstate, or strictly domestic to the states, a disastrous conflict must occur, both legislative and judicial. If the respondent's counsel be right in their position, congress has power to regulate one class of vessels and the states another class navigating the same waters side by side. In order to determine the law and the jurisdiction it would be necessary in every case to first ascertain in what kind of commerce the vessel is engaged. Congress would have the undoubted right to prescribe rules and regulations for the navigation of vessels carrying on commerce among the states and afloat upon the waters of the United States. The states, upon the respondent's theory, would have power to regulate the navigation in the same waters of water-craft engaged in their strictly domestic commerce. The federal government might prescribe one set of rules and regulations; the state government, a different set of rules and regulations. By one authority certain signals for the safety of navigation might be prescribed; by the other, different signals for the same emergency. One legislative power might, in a given situation, give the ascending boat the channel; the other, the descending boat. One government might lay down a rule for steam and sail vessels passing each other, in conflict

with the rule prescribed by the other. In short, the conflict of rules for the safe navigation of water-craft carrying passengers and property in the narrow water-ways of our numberless rivers and artificial channels of commerce would be infinite, unless the power of the states be excluded and that of the federal government be made full and plenary over the navigable waters of the United States. It is needless to dwell upon the mischiefs likely to result from a conflict of rules and regulations. They would be simply intolerable.

All that is here said applies with equal force to the power of congress to regulate navigation upon the sea-coast and lake shores within the limits of the states by vessels engaged in strictly domestic commerce of the states. The power of congress must be exactly the same over navigation above and below tide-water. It is quite certain that the navigation laws of the United States are now framed upon the assumption of the plenary power of congress over the subject of navigation upon the waters of the United States, without reference to the question of intro-state or interstate commerce. See, for illustration, the Revised Statutes. Wherever navigation exists which may carry the vessel beyond the limits of a state into another jurisdiction, there is a necessity for admiralty jurisdiction to establish and enforce the lien of parties who may furnish the vessel in the state from which she may escape. Hence, everywhere upon the navigable waters of the United States, as defined in *The Daniel Ball*, the admiralty jurisdiction is a public necessity. But where navigation exists upon the waters of a state with no outlet—as upon a land-locked lake or river flowing into the same—there is no need of admiralty jurisdiction, since the vessel cannot escape from the state jurisdiction. She is always necessarily in her home port, and the process of the local law could reach her owners. Hence, neither the admiralty lien nor the proceeding *in rem* to enforce it would be required.

I am aware that defendants' counsel have some warrant for their position in the cases cited by them in the argument. It will be seen, however, by an examination of the cases, that their authorities consist of *dicta* disapproved, or cases overruled by the supreme court of the United States in later decisions. The defendants' counsel rely upon the following cases: *The Bright Star*, Woolw. 267; *Allen v. Newberry*, 21 How. 245; *Maguire v. Card*, 21 How. 248.

Neither *The Bright Star* nor *Allen v. Newberry* are in point here. Both of these cases turned upon the construction of acts of congress which in express terms limited the jurisdiction to cases, one of tort and the other of contract, growing out of commerce between different states and territories. The decision in *The Bright Star* turned upon the fourth section of the act of 1864, (13 St. at Large, 120,) requiring the inspection of vessels "engaged in commerce among the states." As the *Bright Star* was charged with the alleged offense while engaged exclusively in the domestic commerce of the state of Missouri, Mr. Justice MILLER held that she was not within the terms of the

statute. *Allen v. Newberry* is still less in point. It was decided upon the act of 1845 relating exclusively to lake commerce. It has been held over and over again that the act of 1845 has no application whatever to our river commerce. It restricts the jurisdiction to commerce and navigation between ports and places in different territories. That case was therefore clearly not within the terms of the statute. See what CLIFFORD, J., says in *The Belfast*, (a later case,) 7 Wall. 641, showing clearly that *Allen v. Newberry* is not in point here, and disapproving of the remarks of the judge in that case. See, also, Chief Justice CHASE in *The Mary Washington*, 5 Amer. Law Reg. (N. S.) 695, 696; also *The Commerce*, *supra*.

Maguire v. Card was a case *in rem* for supplies to the vessel in her home port. This was a conclusive ground against the libellant, because the admiralty then recognized no lien upon a vessel for supplies in her home port. Judge NELSON put the case upon this ground, and also upon the ground that a contract of affreightment between ports of the same state is not within the admiralty, because the jurisdiction of such cases grows out of the power to regulate commerce among the states. This latter doctrine was expressly denied and overruled in the subsequent case of *The Belfast*, and virtually in *The Commerce*, *supra*, 578, 579. See what Chief Justice CHASE says about it in *The Mary Washington*, *supra*; and the resume of CLIFFORD, J., in *The Lot-tawanna*, 21 Wall. 586, commencing at the last paragraph on that page,—showing beyond question that the present doctrine of the supreme court is that the admiralty jurisdiction is not affected by the commerce power, and that it attaches to marine contracts and torts in strictly internal state commerce, where the navigation is upon the waters of the Union.

The case at bar depends upon statutes totally different from the acts of 1845 and 1864. It proceeds upon the act regulating steam-vessels, passed originally in 1871, and found substantially in the Revised Statutes of 1878, c. 1, p. 852, § 4400. Instead of confining the offense to vessels carrying on commerce between different states, it provides that "all steam-vessels navigating any waters of the United States" shall be within the requirements and penalties of the act.

As to the point that the Taylor was a ferry-boat, and not a passenger boat, it is conclusively answered by Judge MILLER in *The Bright Star*, on page 271, Woolworth. A ferry-boat, when she turns aside from her proper business to carry passengers on excursions, ceases *quoad hoc* to be a ferry-boat. She, as to that trip or voyage, becomes, to all intents and purposes, a passenger boat. It would be the veriest evasion of the law, and its purpose of safety to passengers, to permit a ferry-boat to carry passengers on excursions, and escape under the privilege of a ferry-boat.

Exceptions to answer sustained.

See *The Gretna Green*, 20 FED. REP. 901.—[ED.]

THE ALGIERS.¹

(District Court, E. D. Pennsylvania. May 13, 1884.)

1. COLLISION—NEGLECT TO EXHIBIT TORCH—REV. ST. § 4234.

Where a schooner and a steam-vessel are approaching each other in the night-time, it is the duty of the schooner to show a lighted torch, as required by Rev. St. § 4234.

2. SAME—SIDE-LIGHTS.

Where the side-lights are plainly seen, and the situation and course of the vessel fully understood, in ample time to avoid collision, the failure to display the torch may be held unimportant; but the fact that the side-lights were burning, and could have been seen by a careful lookout from the steamer, will not excuse the neglect of the sailing vessel to exhibit a torch, which might have prevented the collision.

Hearing on Libel, Answer, and Proofs.

Libel by the master and owners of the schooner William L. White against the steam-ship *Algiers*, for a collision, in which the steam-ship sank and destroyed the schooner and her cargo. The Providence Washington Insurance Company intervened for their interest, as insurers of the schooner's cargo. The collision occurred shortly before 1 A. M. on November 19, 1882, about 25 miles south-eastwardly from the capes of the Delaware. The wind was fresh from between N. and N. by E., with a high sea. The moon had set at half past 12, leaving the night somewhat cloudy, although many witnesses testified that the stars were visible, and several that, despite the clouds, it was possible to see a vessel, "lights and sails and all," a mile or a mile and a half away; all agreed that it was a good night for seeing lights. The schooner White was sailing N. W. by W., and making between three and four knots per hour, close-hauled, her booms being inboard almost upon a line fore and aft. She was a good sailer, and held this course steadily, keeping to within about five points of the wind up to the moment of collision. Her red and green lights were of good quality, and were trimmed and burning brightly. Her binnacle light (an ordinary lantern about seven inches in diameter) was carried in the binnacle box, on top of the cabin-roof, a position unusually high. The *Algiers* was heading N. N. E., making eight knots an hour. Her white light was seen off the port beam by the schooner's lookout about two hours before the collision, and her green light was visible in the same direction for at least half an hour. Neither the schooner nor her lights were seen by the crew of the steamer until at most 15 minutes before collision. At this time, as the steamer's lookout testified, he saw with his naked eye a white light about three points on the starboard bow; this he supposed to be the distant mast-head light of a steamer, whereas it was alleged by respondents to have been, in reality, the binnacle light of the

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

schooner, placed in an improperly prominent position. The officer on deck examined this light with a glass for from three to five minutes, when the schooner's red light suddenly appeared almost dead ahead. The steamer's helm was at once ported, and as her advancing mast-head light revealed the sails and spars of the schooner, the engines were reversed. At the same moment, the ship struck, head on, just abaft the schooner's fore-rigging, cutting into the schooner from 10 to 15 feet, and sinking her instantly. The mate of the schooner swore that, on seeing the steamer approaching, he grasped the binnacle lantern and swung it at the steamer for five or six minutes; those witnesses on the steamer who saw the lantern denied that it was swung long enough before the moment of collision to be of the least benefit. At no time did the schooner display to the approaching steamer a lighted torch.

S. M. Thomas, H. Galbraith Ward, and Henry R. Edmunds, for libelants.

Although the displaying of a lighted torch is required by statute, an omission to observe this regulation will not fix the loss upon the negligent party, unless that omission contributed to the accident. A similar rule has been laid down where lights and lookouts have been neglected. *The Farragut*, 10 Wall. 334; *The Fannie*, 11 Wall. 238; *The Dexter*, 23 Wall. 69; *The Wanata*, 95 U. S. 600; *The Tillie*, 13 Blatchf. 514; *The Buckeye*, 9 FED. REP. 666. Therefore, where the sailing vessel was seen, or, under the circumstances, should have been seen, the neglect to display a torch has been held immaterial. *The Scottish Bride*, 8 Phila. 151; *The Tonawanda*, 11 Phila. 516; *The Leopard*, 2 Low. 242; *The Catherine Whiting*, 3 FED. REP. 870; *The Roman*, 14 FED. REP. 61. In this case the steamer's lookouts should have seen the schooner's red light long before they did; it was negligence in them not to have done so. Failing to see the red light, there is no reason to suppose they would have seen the torch. Confer *The Oder*, 8 FED. REP. 172.

E. D. McCarthy and Morton P. Henry, for intervenors.

The cargo must recover if the steamer's fault contributed to the collision. *The Atlas*, 93 U. S. 302. The measures of time in collision cases are always inaccurate and unreliable. *The Carroll*, 8 Wall. 304. From their courses, if the steamer saw the schooner's lights at the time stated, the collision could not have occurred. The "fifteen minutes" was probably less than five, and it was negligence in the steamer not to have seen the schooner's red light sooner.

Curtis Tilton and Henry Flanders, for respondents.

The failure to display the torch was *per se* negligence, under section 4234, Rev. St. *The Pennsylvania*, 12 FED. REP. 916; *The Excelsior*, Id. 203; *The S. H. Crawford*, 6 FED. REP. 911; *The Narragansett*, 3 FED. REP. 253; *The Sarmatian*, 2 FED. REP. 916. The schooner permitted a white light to be visible from her deck. This was a misleading signal, and should condemn the vessel displaying it.

The Scotia, 14 Wall. 183; *The Narragansett*, 11 FED. REP. 921; *The Rob Roy*, 3 W. Rob. 197; *The Mary Honnsett*, L. R. 4 Prob. Div. 207; *The Scotia*, 7 Blatchf. 308. The steamer is only required to show that she had a vigilant lookout, and that the lights were not seen; why they were not seen she is not bound to prove. *The Elenora*, 17 Blatchf. 88; *The Frank Moffatt*, 11 Chi. Leg. N. 114; *The Sam Weller*, 5 Ben. 293; *The Nichols*, 7 Wall. 657.

BUTLER, J. The libelant failed to display a torch. In this she disregarded the law, and was plainly in fault. She answers, however, that this fault did not contribute to the disaster, and has called a large number of witnesses who support the assertion. This testimony is deemed of little, if any, value. In view of the circumstances shown, the positive declaration that the display of this light would not have tended to avoid the collision, seems like a reckless venture. The direct tendency of its absence was to produce the disaster. The law has determined the presence of such a light to be essential to safety, under circumstances such as existed when this collision occurred. That the flaming torch is more likely to attract attention than the ordinary side-light, is very manifest. This greater likelihood of arresting attention led to its adoption. How, then, can it be said that this light would not have been seen, and the collision avoided, if it had been displayed? Granting that the respondent's lookout was careless, how can it be affirmed that the glare and flash of the torch would not have attracted the attention of even this careless lookout? So much less frequently displayed than the ordinary light, and bearing the character of a danger signal, its presence could hardly have been overlooked. There are, of course, circumstances in which the failure to display it may be held unimportant; as where the side-lights were actually and plainly seen from the approaching steamer, and the situation and course of the vessel fully understood, in ample time to avoid collision. Here it is not suggested that these lights were seen. It is clear they were not. Whether they *should* have been, is a different question, and unimportant in this connection. The libelant was plainly in fault. She saw the steamer in abundant time to warn her, and yet did not. That the situation demanded it, seems too plain for discussion. The exhibition of the globe light, at the moment of collision, was of no value.

Was the respondent also in fault? The only fault imputed is in having an insufficient lookout. It must be conceded that the libelant's side-lights were burning. Her witnesses fully establish this fact. I am asked to infer from it that the steamer's lookout was imperfect. If the case rested here, the inference would seem just, and might be adopted. But the respondent's testimony is equally full and positive that the steamer's lookout was *vigilant*, and that the lights were not seen. Before this direct evidence the inference must give way. It must do so, unless, indeed, the respondent's witnesses are perjured.

A suggestion of perjury, however, would be unwarranted. As reasonably might it be said that the libelant's lights were not burning because the respondent's witnesses did not see them. The lights were burning, and the respondent's lookout was vigilant and sufficient. No other conclusion is admissible. The latter fact is as satisfactorily proved as the former.

Why the lights were not seen need not be determined. The case, in this respect, is strikingly similar to that of *The Narragansett*, 3 FED. REP. 253, and 11 FED. REP. 291; and what is there said on this subject is equally applicable here. A solution of the problem may, however, be found in the suggestion that the position of the vessels was not that ascribed to them by the libelant. A slight change would so place them that neither side-light could be seen from the steamer, and thus reconcile all the testimony. That such was their position, seems very probable, if not entirely clear, from the facts that the side-light was not seen, and that a white light, corresponding with the libelant's binnacle light, (which was carried unusually high,) was seen. There is little testimony less satisfactory than that respecting the position of vessels preceding a collision. The reliance placed on the supposed direction of the blow received by the respondent, is not justified by anything in the case. She sank immediately after receiving it, barely affording time for the crew to escape. The officers' hasty glance at the wound was sufficient to see its fatal character, but not to form a judgment respecting the question under consideration, and it is quite certain this was not in mind.

The libel must be dismissed, with costs.

THE EPHRAIM AND ANNA.¹

(Circuit Court, E. D. Pennsylvania. May 5, 1884.)

SALVAGE—SEVERAL SALVORS—DEVIATION BY TOW—INTERPLEADER BETWEEN SEVERAL SALVORS.

Where a tow-boat, while towing a ship from one port to another, by a slight deviation, rescues an abandoned vessel and tows it astern to port, the tow-boat is alone entitled to salvage. A deviation for the purpose of rescuing a vessel may affect the insurance of the tow, and force a breach of the contract of towage; but that does not entitle the tow to compensation in the nature of salvage.

Appeal by the Mary L. Cushing from the Decree of the District Court awarding salvage exclusively to the tug Storm King.

Libels were filed by the masters of the tow-boat Storm King and the ship Mary L. Cushing, presenting substantially the same facts, as follows: That on the fifteenth day of June, 1883, at 6 o'clock A.

¹ Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

m., the said tow-boat Storm King was proceeding from Boston to Philadelphia, with the ship Mary L. Cushing in tow, bound for Philadelphia, and when off Barnegat light, bearing W. $\frac{1}{2}$ N., and about 27 miles distant, the master of the tow-boat sighted a schooner in distress, with flags flying in the fore and main rigging, to seaward of the tug-boat, and on her port bow, about 10 miles distant; that the tow-boat thereupon altered its course and stood towards the vessel, which appeared to be in distress; that he sent a boat with men on board, and found the schooner abandoned; that thereupon he took the schooner in tow, astern of the ship, fastened with a hawser belonging to the tow-boat, and towed both into the breakwater, at which place he procured the services of another tug to take the ship to Philadelphia, and proceeded with the schooner in tow to the port of Philadelphia, where he arrived in safety on the following morning.

By agreement of counsel for the three vessels and for the Virginia Home Insurance Company, the court decreed an interpleader between the parties, and fixed the amount of salvage at \$1,200. Subsequently judgment was entered for the full amount of salvage in favor of the Storm King, whereupon the Mary L. Cushing appealed.

Curtis Tilden and Henry Flanders, for appellants.

Where the cargo being towed assents, or may be presumed to have assented, to a deviation to rescue a vessel, it is entitled to a proportion of the salvage. *The Blaireau*, 2 Cranch, 240; *The Nathaniel Hooper*, 3 Sumn. 543. That delay or departure from the course of the voyage to save property is a deviation, and involves a loss of insurance, is a well-settled principle of American law. *The Cora*, 2 Wash. C. C. 80; *Foster v. Gardner*, Amer. Jur. No. 21; *The Henry Ewbank*, 1 Sumn. 400. In the latter case Judge STORY said that any stoppage on the high seas, except for the purpose of saving life, would be a deviation, and discharge the underwriter. *The Boston and Cargo*, Id. 328. This is likewise the law of England, and so expressly held in *Scaramango v. Stamp*, L. R. 5 C. P. Div. 295.

Morton P. Henry, for the Storm King.

Towage is a contract by which the tug undertakes to expedite a voyage. The tug is neither a common carrier nor a bailee of the tow. *Transp. Line v. Hope*, 95 U. S. 297. The tug is not the servant of the tow, nor are its servants the servants of the ship. *Sturgis v. Boyer*, 24 How. 110; *The Galatea*, 92 U. S. 439; *The James Gray*, 21 How. 184. When a tug undertakes to tow a vessel, each vessel, in its own way, is liable for the acts of its servants, and not one for the other,—the ship, if its servants, and the tug, if its servants, are in fault. *The Galatea*, *supra*; *The Margaret*, 94 U. S. 494. But if the ship had the right to refuse, such services are not of the merit which makes the owner of the vessel a salvor, or entitles him to participate. Such services are compensated by way of equitable compensation, when any real damage is done or a loss is sustained. *Hawkins v. Avery*, 32 Barb. 551; *The Charlotte*, 3 W. Rob. 68. If a devi-

ation does take place for the purpose of a rescue, the tug becomes an insurer of itself and the ship in tow, and liable for any subsequent misadventures. *Scaramango v. Stamp*, L. R. 5 C. P. Div. 299; *Davis v. Garrett*, 6 Bing. 716.

McKENNAN, J. Obviously, the just basis of apportionment of salvage among several salvors is the extent of the salvage service rendered by them respectively. Judged by this standard, it is difficult to see upon what ground of merit the claim of the *Mary L. Cushing*, for any part of the salvage allowed, can rest. It is true that the derelict schooner was fastened to her by a hawser, and in this condition they were towed to the Delaware breakwater by the steam-tug *Storm King*. But she was only a passive means of towage employed by the tug, and rendered no actual, effective service herself. This was altogether performed by the tug. There is no other evidence of contributory service by the ship, and I think that is not of a character, under the circumstances, to entitle her to any part of the salvage compensation.

It was earnestly urged by the learned proctor for the appellant that the ship ought, at least, to share in the salvage, because she was taken out of her course by the tug, and thus subjected to the risk of forfeiture of her policy of insurance. Really, the departure made from the ship's most direct path did not involve any increase of the hazards of navigation. The deflection from a direct course was so slight, and the consequent prolongation of the voyage so inconsiderable, that both may be said to be inappreciable. Besides, when the signals of the distressed vessel were seen, the tug had good reason to apprehend that human life was in peril, and so was justified in going to her relief. But when it was found that the crew of the schooner had abandoned her, and that no merely humane service was needed, the tug, by attaching a hawser to her and towing her to a place of safety, may have thereby been guilty of a deviation, in its narrowest, technical sense. It may also have devolved upon itself the liabilities of the *Mary L. Cushing's* insurers, and have incurred damages for a formal breach of its contract of towage; but all this did not constitute the *Mary L. Cushing* a salvor, and entitle her to compensation, which can be claimed in that character alone.

A decree will therefore be entered awarding the whole salvage fund to the *Storm King*, dismissing the libel of L. W. Brown, master of the *Mary L. Cushing*, and directing that the costs of his interpleader be paid by him and his stipulator.

TEILMAN v. PLOCK and others.

(Circuit Court, S. D. New York. July 30, 1884.)

1. DEMURRAGE—CHARTER-PARTY—MASTER—CONSIGNEE—CARGO—PLACE OF DISCHARGE.

When a charter-party specifies that the cargo shall be discharged at the same place as the other cargo, such discharging to commence immediately after arrival of the ship, in order to recover demurrage from the consignee, the master must show that he provided a suitable place for discharging the goods, or his inability to do so, or else some circumstance relieving him of his duty to provide such suitable place.

2. SAME—WHAT IS A "SUITABLE PLACE."

A suitable place for discharging iron rails is not a place at which the customs officers will not weigh such article, and is not a place where the owners of the wharf will not permit iron rails to be landed.

In Admiralty.

Beebe, Wilcox & Hobbs, for libelant.

E. S. Hubbe, for respondent.

WALLACE, J. This is a libel by the master of the Norwegian bark Anna against the respondents, as consignees of part of the cargo, for demurrage for three days' detention in discharging cargo. The cargo was carried under a charter-party with one Wissman, and was consigned to several consignees, and consisted of empty petroleum barrels, iron rails, and pig-iron, the barrels being stowed on top. The respondents were the consignees of the iron rails only, and these were shipped under a bill of lading which, after providing for the terms of freight, specified that the cargo should be discharged at the same place as the other cargo, to commence immediately after arrival of the ship, without delay, and "all other conditions as per charter-party with Mr. Wissman." The charter-party provided for loading and discharging the vessel with customary quick dispatch, the cargo to be received and delivered along-side the vessel, within reach of her tackles, at consignee's risk and expense; lighterage, if any, to be borne by the cargo, and for demurrage at the rate of £9 per day for each days' detention by default of charterer.

The bark arrived at the port of New York, August 30, 1880, and proceeded to the Atlantic docks to discharge the barrels. The respondents were duly notified by the agent of the vessel-owners, and asked to attend to the discharge of the rails as soon as the barrels should be discharged, and they promised to send a lighter to receive the rails if they could obtain a custom-house permit. On September 3d the captain of the lighterman, to whom respondents had given a delivery order, left the order with the mate of the bark, promised to send a lighter as soon as she was ready to discharge the rails, and was informed by the mate that she would be ready the next morning between 9 and 10 o'clock. At that time she was not along-side the wharf, but was discharging the barrels while lying aside of another vessel. On Saturday, September 4th, the captain of the lighter called

and got the order back again, took it away, and returned in the afternoon and stated that he could not get permission to discharge the iron from the custom-house authorities unless they were allowed to weigh it on the deck of the vessel. It was not customary to permit a discharge of iron upon a lighter unless the iron was first weighed on the deck of the ship. The mate referred him to the agent of the vessel, who was not on board, to obtain permission, but the captain of the lighter refused to look up the agent. The vessel did not obtain a berth along-side the wharf until Saturday afternoon. The owners of the dock would not allow iron to be landed on their dock even for the purpose of weighing. Nothing more was done in behalf of the respondents, but on Tuesday, pursuant to an understanding that they would receive the rails at Merchants' stores, the bark proceeded there, where on Wednesday the rails were put upon the wharf, weighed, and taken away by the lighter.

If the libellant is entitled to recover any demurrage, it must be upon the theory that the respondents were under obligation either to receive the rails upon the lighter, under the circumstances of the case, or to select a suitable wharf for the purpose. Neither of these propositions can be maintained. By the terms of the bill of lading the respondents became parties to all the conditions of the charter-party except such as were supplanted or modified by the special conditions of the bill of lading. *Davis v. Wallace*, 3 Cliff. 130; *Smith v. Sieveking*, 4 El. & Bl. 945; *Wegener v. Smith*, 24 L. J. C. P. 25. But they were under no obligation to accept a delivery of their part of the cargo upon a lighter, in the absence of proof of any usage of the port authorizing such a delivery by the carrier. The conditions of the charter-party providing for delivering the cargo along-side the vessel at the consignee's risk and expense, and for the payment of lighterage, were undoubtedly intended for the protection of the carrier, and to relieve him from responsibility or expense in protecting or warehousing the cargo, in case the consignees should neglect to receive it after proper notice. Other than this they imposed no exceptional liability upon the respondents. The charter-party and the bill of lading, together, import an obligation on the part of the consignees to accept their part of the cargo at any suitable place of delivery, without delay, as soon as the condition of the ship in reference to the rest of the cargo would permit their part to be delivered. They were not obliged to take the rails until they could be delivered by the ship, and then they were bound to take them without delay.

The place of delivery seems to have been selected by the master or by the ship's agent. It was not a suitable place, because the owners of the Atlantic docks did not permit rails to be landed on their dock, and would not allow these rails to be landed there. The respondents, as owners of a part only of the cargo, had no right to control the selection of the place of delivery. They had stipulated to accept their rails at the place where the rest of the cargo should be delivered. The

charterers did not assume to select the place of delivery, nor did the other consignees. The case is like one where a general ship undertakes a delivery to several consignees of their respective parts of the cargo. It is doubtful in such a case whether the consignees jointly have any any right to select the place of delivery. In *The E. H. Fittler*, 1 Low. 114, it was held that they have such a right when they are unanimous; but the question was decided upon the usage of the port. Where there are several consignees the master cannot conveniently consult them, and certainly, unless they unite in the selection of the place of delivery, his duty is satisfied by a delivery at a place suitable and reasonably convenient for all, under the special circumstances. His contract is fulfilled by delivery from the ship at a proper place within the port. If he does not deliver to the consignee personally, he must justify his substituted delivery by showing that it was in accordance with the terms of his contract or with the usage of the port or with the course of business between the parties. *Gatliffe v. Bourne*, 4 Bing. N. C. 314; 3 Man. & G. 642; 7 Man. & G. 850; *Humphreys v. Reed*, 6 Whart. 435; *Hemphill v. Chenie*, 6 Watts & S. 62; *Ostrander v. Brown*, 15 Johns. 39.

The respondents are not liable because they failed to select a place to receive their cargo, when they had no power of selection. The libelant was not obliged to await their action. He cannot hold them responsible for a delay which would not have injured him, and would not have occurred if he had performed his own duty. They undertook that there should be no delay in the delivery of the cargo on their part, but they did not undertake to assume liability for his delay, or for his failure to offer a suitable delivery to them.

If the respondents had assumed to direct a delivery upon the lighter, or had promised unqualifiedly to provide a lighter for the reception of their rails, a foundation for the claim for demurrage would be established. But they stated to the vessel agent that they would send a lighter if they could get a permit. It is true, the captain of the lighter informed the libelant that he would be ready to receive the rails when the ship was ready to discharge them; but when that time came he informed the mate, who was then in charge of the vessel, that he could not get permission of the customs authorities to take them unless they could be weighed on the deck of the vessel. No delay ensued in consequence of his promise to take them. As it was understood from the outset that acceptance of delivery upon the lighter was conditional upon the consent of the customs authorities, it was incumbent upon the libelant to consent when requested, or to treat the negotiations as ended, and select his own place of delivery. The respondents held out no inducements for further delay, and in the absence of any circumstances relieving the libelants of the duty of procuring a suitable place to discharge the rails, or showing his inability to do so, he has no reason to complain of the delay.

The decree of the district court is affirmed, with costs.

BLOWERS v. ONE WIRE ROPE CABLE AND NEW YORK WIRE ROPE CO.

(Circuit Court, S. D. New York. August 1, 1884.)

1. CONTRACT—MUTUAL PERFORMANCE.

When two acts are to be done concurrently by parties under a contract, the obligation on the part of each is dependent upon that of the other, and the act of each is done upon implied condition of performance by the other.

2. ESTOPPEL—SEIZURE OF BOAT—ASSERTION OF FAILURE TO EARN, WHEN PLAINTIFF THE CAUSE.

The vendor of a cargo delivered by him on libelant's boat, to be carried by libelant for a third party, appropriated the boat in order to coerce payment from such party of the purchase price of the cargo. The vessel owner having libeled the cargo, *held*, that the vendor, who intervened as claimant, was estopped from claiming that the libelant had not earned freight.

In Admiralty.

T. C. Campbell, for libelant.

Scudder & Carter, for claimant.

WALLACE, J. There is nothing in the terms of the contract between the libelant and the Cable Towing Company necessarily inconsistent with the intentions of the parties to recognize the existence of a lien of the libelant upon the cable for his freight. Payment of the freight was to be made by the Cable Towing Company concurrently with the delivery of the cargo, although the libelant was to commence delivery before payment. The contract provided for a peculiar mode of delivery of the cargo, but it does not differ otherwise essentially from the common contract for the payment of freight upon delivery. Where two acts are to be done concurrently by parties under a contract, the obligation on the part of each is dependent upon that of the other, and the act of each is done upon the implied condition of performance by the other.

The Wire Rope Company, the claimant, prevented the libelant from performing his contract with the Cable Towing Company and earning his freight. The claimant knew, or had notice equivalent to knowledge, of the terms of the contract between libelant and the Cable Towing Company, and knew that the libelant was not the agent of that company in receiving the cable. The claimant also knew that by appropriating libelant's boat in order to coerce the Cable Towing Company to pay for the cable, the libelant would be prevented from performing his contract with that company, and from earning his freight. The circumstance that the claimant had the right to thus compel payment of the Cable Towing Company as against that company, does not affect the rights of the libelant, because as against him the claimant had no such right. Under such circumstances the libelant is not to be placed in a worse condition through the conduct of the claimant than he would occupy if he had been permitted to perform his contract and earn his freight. The claimant should, therefore, be deemed estopped from asserting that the libelant did not earn his freight.

The decree of the district court is affirmed, with costs of this appeal.

RAISIN FERTILIZER Co. v. SNELL and another.¹*(Circuit Court, S. D. Georgia. May 1, 1884.)***1. FEDERAL COURT—JURISDICTION—ALLEGATIONS—CITIZENSHIP—PROMISSORY NOTE.**

To entitle a person to sue upon a promissory note, other than one negotiable by the law-merchant, in a federal court, there must be an allegation of the citizenship of the original owners of the paper sued on.

2. SAME—PROMISSORY NOTE—LAW-MERCHANT.

Since the jurisdiction must appear by affirmative allegations, it is necessary that the bill of exchange or promissory note sued on be one negotiable by the law-merchant.

3. SAME—EFFECT OF CONDITIONS.

The character of the note must determine the question of jurisdiction, and the fact that the party suing is willing to waive certain of his rights under it, and sue on such a portion of the contract as might constitute a negotiable instrument, cannot give it.

Action on Promissory Note. Motion to dismiss for want of jurisdiction.

This was an action having a statutory and common-law count on a note in the following terms:

"\$1,040.

SAVANNAH, GA., April 20, 1881.

"On or before the seventeenth day of October next we agree to pay J. S. Wood & Bro., or order, for advances, one thousand and forty dollars, and eight per cent. interest from maturity. We waive expressly all right that we or our dependents may have to retard the collection of this debt by claiming home-stead or personalty exemption, under the laws of Georgia, on any property we may hereafter own. If this note is not paid promptly, we agree to pay costs, if sued, and ten per cent. as stipulated attorney's fees. We agree to ship, before due, one bale of cotton to J. S. Wood & Bro. for each ten dollars of this claim, or in default to forfeit to them the commissions at 2½ per cent. on 500 pounds, at price of middling cotton, when due.

"Witness our hands and seals:

C. W. SNELL. [Seal.]

"B. W. SNELL. [Seal.]

"Signed in our presence:

"GEO. W. WOOD.

"Indorsed: J. S. WOOD, CHAS. S. WOOD, J. S. WOOD & BRO."

The plaintiff in its declaration avers itself to be a citizen of the state of Maryland, and that the defendants are citizens of the state of Georgia, and alleges therein that the said note was indorsed by said J. S. Wood & Bro. and by them delivered to said plaintiff, but there is no allegation as the citizenship of Wood & Bro.

Chisholm & Erwin, for plaintiff.

J. K. Hines, for defendants.

LOCKE, J., (*orally*.) There is no allegation of the citizenship of the original owners of the paper sued on, and since jurisdiction must

¹ Reported by W. B. Hill, Esq., of the Macon bar.

appear by affirmative allegations it is necessary that the foundation of the suit be a bill of exchange or a promissory note negotiable by the law-merchant. Its form at once precludes the idea that it is a bill of exchange, but it is claimed that it is a promissory note. It is not sufficient that it be a promissory note as between the parties, or even negotiable under certain circumstances and with certain conditions, but it must be negotiable by the law-merchant. It must be a positive promise and agreement to pay the holder a sum certain at a given date, without detraction or conditions; an amount that is easily determinable from its own face without further search or inquiry. The character of the note must determine the question of jurisdiction, and the fact that the party suing is willing to waive certain of his rights under it, and sue on such a portion of the contract as might constitute a negotiable instrument, cannot give it.

It is apparent that the last clause in the note in suit contains conditional provisions, which might be still undetermined at its maturity, so that it could never bear upon its face a fully settled amount due, which fact is conclusive against its negotiability under the law-merchant, and consequently against the jurisdiction in a suit upon it.

The fact that the instrument is under seal has also been urged, which objection, in the light of *Coe v. Cayuga Lake R. Co.* 8 FED. REP. 535, would seem to be fatal; but the form and substance of the note so fully determines all questions that a consideration of anything further is unnecessary.

Motion to dismiss is granted.

PALMER v. SCRIVEN and another, Receivers, etc.¹

(Circuit Court, S. D. Georgia. April 26, 1884.)

ACTION AGAINST RECEIVERS.

When based upon consent to sue, on petition to equity court, can only be entertained by that court.

Common-law Action for Personal Injury. Motion to dismiss for want of jurisdiction.

Denmark & Adams, for plaintiffs.

Chisholm & Erwin, for defendants.

PARDEE, J., (*orally.*) Permission to sue must be given by the equity court. Such permission cannot confer jurisdiction upon any other court, *ratione materie* or *ratione personæ*. In this case, the permission being obtained from the court of equity, this suit was permitted only to be brought in that court. There is no permission to sue

¹ Reported by W. B. Hill, Esq., of the Macon bar.

in this court on the law side. This court, as a court of law, is without jurisdiction, so far as the record shows, by reason of the citizenship of the parties, and consequently has no jurisdiction in the case. Motion granted.

LOCKE, J., concurs.

HAUSMEISTER v. PORTER, Treasurer, etc.

(Circuit Court, D. California. August 25, 1884.)

EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—REV. ST. § 723—PAYMENT OF COUPONS ON MUNICIPAL BONDS—MANDAMUS.

Where a writ of *mandamus* will lie to compel a city treasurer to pay coupons due on bonds of the city out of the fund provided by statute, or to compel the proper officers to set apart taxes collected as a sinking fund for the payment thereof, the bondholder has an adequate remedy at law, and cannot proceed by bill in equity, not ancillary to any pending proceeding at law, to enjoin the application of the funds to other purposes.

In Equity.

Rosenbaum & Scheeline and S. C. Denson, for complainant.

W. A. Anderson and J. H. McKune, for defendant.

SAWYER, J. This is a bill in equity, filed against the treasurer of Sacramento city by a holder of \$10,000 of the bonds, and \$600 overdue coupons thereon, of the city of Sacramento, issued in pursuance of the laws, and under the circumstances fully set forth in *Kennedy v. City of Sacramento*, 19 FED. REP. 580. The bill alleges the facts relating to the issue of the bonds and the amount held by complainant; that there is a large amount of money—\$174,000 and upwards—in the interest and sinking fund in the city treasury, applicable to the payment of said coupons, and something over \$170,000 of taxes and water rents, collected for the year 1883-84, in the city treasury, and that "it is the duty of said treasury to apportion and set apart to said 'interest and sinking fund' fifty-five per cent. of the whole of said revenues, and to hold and pay out the said fifty-five per cent. of said sums for the purposes of said fund and no other purpose;" that the complainant has demanded payment of said coupons held by him, and that said treasurer should set apart said 55 per cent. to said interest and sinking fund, and only apply it for the proper uses of said fund; that said treasurer refuses to comply with said demand, and is unlawfully diverting said fund to other objects of city expenditure, and, if not restrained from so doing, will appropriate the whole of said fund to such other objects, and leave nothing applicable to the payment of said bonds and coupons. He therefore asks, as relief, that defendant be perpetually enjoined from paying out said money for any other purpose than the liquidation of said bonds and coupons;

and he further asks for a preliminary injunction pending the suit. Defendant demurs to the bill on the ground of want of equity, and that the facts disclosed show no cause of equitable jurisdiction. He also opposes the preliminary injunction on the same grounds.

Section 723, Rev. St., provides that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law." And this provision has been often recognized and enforced by the supreme court of the United States; as in *Hipp v. Babin*, 19 How. 271; *Parker v. Winnipiseogee Co.* 2 Black, 545; *Watson v. Sutherland*, 5 Wall. 74, and many other cases.

In this case, if, as alleged, there are funds in the treasury applicable to the purpose, it appears to me that the complainant has a plain, adequate, and complete remedy at law, by *mandamus*, for the non-payment of any lawful coupons held by him now due. Also, a complete remedy at law, by *mandamus*, if any remedy he has at this time, to compel defendant to set apart any moneys in the treasury required by law to be set apart as a "sinking fund" for the payment when they fall due of any bonds held by him not yet matured. In a case relating to a part of these same bonds, the supreme court of California, in *Meyer v. Porter*, 2 Pac. Rep. 884, held that a *mandamus* should issue to compel the treasurer of Sacramento to pay the overdue coupons, there being money in the treasury applicable to their payment.

It is alleged in the bill that there is a much larger amount of money applicable to the purpose in the treasury than is necessary to pay complainant's overdue coupons. That being so, the supreme court hold that it is the duty of the treasurer to pay them, and, if he refuses payment, that he can and should be compelled to pay them by *mandamus*. So, also, in *Meyer v. Brown*, the supreme court of the state, sitting in bank, in regard to this same class of bonds, unanimously held the writ of mandate to be a proper remedy to compel the city authorities to levy a tax to supply a fund to pay these coupons. In this case the court followed the judgment of the supreme court of the United States in *Louisiana v. Pilsbury*, 105 U. S. 302, which directed a writ of *mandamus* to issue to compel the city of New Orleans to levy an annual tax to pay the interest on the bonds then in question. See, also, *Kennedy v. Sacramento*, 19 FED. REP. 580.

From these cases it is clear that if there is money in the city treasury applicable to the purpose,—and it is alleged that there is,—the treasurer can be readily compelled by *mandamus* to pay the amount due complainant on his coupons; and if the officers do not provide the funds by levying the proper tax, that they can be compelled to do so by *mandamus*. This is a remedy at law direct, speedy, and adequate, and, as was stated in the last case cited, the only remedy, in view of the provisions of the statute under which the bonds were

issued and accepted. The decree asked for in this bill would afford no relief whatever without other and independent proceedings at law. It would simply keep the money in the treasury. No decree for the payment of the money could be made, because a judgment against the city, at law, would be ample for that purpose where a judgment could be had, and no such decree is asked. But, in the case of these bonds, it was held in *Kennedy v. Sacramento*, *supra*, that a judgment at law against the city could not be obtained under the statute. For the same reasons, no decree in equity could be had, even if the court had jurisdiction in other respects to enter such a decree. But it has none, as the remedy, if any, would be a judgment at law. The decree asked does not appear to be ancillary to any proceeding at law now pending, or even contemplated, to obtain the money if retained in the treasury. But if it is the duty of the treasurer to pay these coupons out of the funds alleged to be in the treasury, the most direct, speedy, and effective way to obtain payment is by *mandamus* in a court of law. This remedy is complete and adequate. It would not only prevent the money from being diverted to other purposes,—all that this bill seeks,—but would secure the payment of the overdue coupons held by complainant, and be, in itself, a full and adequate remedy, while that sought in this bill could only be ancillary to some other remedy in a court of law, to which complainant would be driven at last.

The bill, in my judgment, presents no case of equitable cognizance. The preliminary injunction must be denied, the demurrer to the bill sustained, and the bill dismissed; and it is so ordered.

PRICE, Receiver, v. COLEMAN and others.

(Circuit Court, D. Massachusetts. September 3, 1884.)

1. EQUITY—PLEADING—MULTIFARIOUSNESS—ACTION BY RECEIVER OF NATIONAL BANK.

Where a bill, brought by the receiver of a national bank against all of the directors holding office during the existence of the bank, the legal representatives of deceased directors, and the cashiers of the bank, joins claims for losses suffered by the bank by reason of the directors' negligence and inattention, and claims for losses suffered by the stockholders by reason of having been induced to subscribe for new shares by misrepresentations of the directors, it is multifarious.

2. SAME—CERTAINTY—DEMURRER.

Where such a bill does not state the dates of the losses sustained by the corporation, nor the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him, it is demurrable.

In Equity.

A. A. Runney and J. R. Clark, for complainant.

E. R. Hoar, Henry Baldwin, J. W. Richardson, Sherman & Bell, Richard Stone, Geo. F. Williams, Jesse F. Wheeler, Joseph Cuttler, Morse & Allen, and Brooks & Nichols, for defendants.

Before GRAY and NELSON, JJ.

GRAY, Justice. To the bill in its present shape the demurrers for multifariousness and for uncertainty are well taken. The bill is clearly multifarious in joining claims for losses suffered by the corporation by reason of the directors' negligence and inattention, and claims for losses suffered by the stockholders by reason of having been induced to subscribe for new shares by misrepresentations of the directors. The bill, brought against all those who were directors during various periods of time, does not state the dates of the losses sustained by the corporation, nor the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him. The bill must be amended, in these respects, at least, before the court can justly or intelligently determine, as between the complainant and the several defendants, whether the bill is multifarious in joining as defendants those who were directors at different times; whether it sets forth a liability upon which the complainant can maintain a bill in equity; and whether it sets forth a cause of action which survives against representatives of deceased directors.

Demurrers sustained, with costs; leave to amend the bill.

HENDERSON v. CENTRAL PASSENGER RY. CO.¹

CENTRAL PASSENGER RY. CO. v. LOUISVILLE CITY RY. CO.¹

(Circuit Court, D. Kentucky. July 22, 1884.)

1. FRANCHISE—RAILROAD CORPORATION—CONSTRUCTION OF GRANT—MOTIVE POWER.

A legislative grant to the Louisville & Portland Railroad Company of a franchise to build and operate a railroad from Louisville to Portland, along such streets as the city council should consent to, with power to use passenger and burden cars, to furnish means of transportation, to charge tolls for passengers and freights, and "to do and perform every act and thing necessary and proper to carry into effect the provisions of that act and promote the design of the corporation," but without specifying what motive power should be used, authorized the city council to limit the power to be used to horse-power.

2. CORPORATION—SALE OF FRANCHISE—WHAT PASSES THEREBY—REPEAL OF FRANCHISE—CONSTITUTIONALITY.

The Kentucky act of February 14, 1856, provided that all privileges and franchises thereafter granted to corporations should be subject to amendment or repeal at the will of the legislature. The L. & P. R. Co. had theretofore been incorporated, and under its charter had built and operated a street railroad on Bank street. Thereafter, in 1866, the Citizens' P. Ry. Co. was incor-

¹ Reported by Geo. Du Relle, Asst. U. S. Atty.

porated, and by its charter empowered both to build and operate street railways, with the consent of the city council, and to lease or purchase the L. & P. Railroad, "its franchises and all property." It thereupon purchased the L. & P. Railroad, its franchises and property, and operated the road on Bank street. The corporate life of the L. & P. R. Co. was without limit; that of the Citizens' P. Ry. Co. was limited to 30 years. Thereafter, in 1872, the L. C. Ry. Co., which was incorporated in 1864, purchased from the Citizens' P. Ry. Co. all of its roads, property, and franchises. *Held*, that the corporate existence of the L. & P. R. Co., and its right as a corporation to operate the road, did not pass by the sale of the Citizens' P. Ry. Co., nor by the sale from the Citizens' P. Ry. Co. to the L. C. Ry. Co.; that the corporate life of the Citizens' P. Ry. Co. was not extended beyond 30 years by the purchase from the L. & P. R. Co.; that the Citizens' P. Ry. Co. and the L. C. Ry. Co. each operated the road under its own charter; that each of said charters, having been granted subsequent to the act of 1856, was subject to the provisions of that act, and that their amendment or repeal was constitutional.

3. RIGHT OF WAY—DUE PROCESS OF LAW—ABANDONMENT BY NON-USER—PRESUMPTION OF ABANDONMENT—CONSTITUTIONALITY OF NEW GRANT

A right of way acquired by a railroad corporation, prior to the act of 1856, and transferred to a corporation created subsequently to said act, is property, and a legislative enactment giving it to another corporation is not due process of law. Such right of way may be lost by abandonment, and a non-user of more than 10 years is *held* to be sufficient evidence of abandonment. Abandonment is to be more readily presumed where the easement is granted for the public benefit than where it is held for private use. When such a right has been so abandoned, it is constitutional for the state to grant it to another corporation.

In Equity. On motions to dissolve injunctions.

A. P. Humphrey and St. John Boyle, for Louisville City Ry. Co. and Mrs. Henderson.

Brown & Davie, Barnett, Noble & Barnett, and Zach. Phelps, for Central Passenger Ry. Co.

BARR, J. These cases come to this court from the Louisville chancery court, and from the vice-chancellor's court, with injunctions already granted upon *ex parte* motions; and they are now submitted upon motion of defendants, in each case, to dissolve the injunctions. The Louisville City Railway Company has filed a cross-bill against the Central Passenger Railway Company, and has moved for an injunction. These motions really involve the same question, and will be considered together. The material question is, who has the right to run a street railway down Bank street, in this city, from Nineteenth street to and through Portland to the wharf, by what is commonly called the "Bank-street route?" The Central Passenger Railway Company claims this right by and under the authority of an ordinance approved January 25, 1884, and an act of the general assembly approved March 14, 1884. The act repeals all laws and ordinances in conflict with the grant therein made, which is a grant to build and operate a street railway over the route in controversy. This authority is sufficient, and gives the Central Passenger Railway Company this route, unless the act itself is unconstitutional, as impairing the obligation of a contract, or because it deprives the Louisville City Railway Company of its property without due process of law.

The state of Kentucky owned, by purchase, the Lexington & Ohio Railroad, and donated to the Kentucky Institution for the Education of the Blind that part of the road which ran from Sixth street, in Louisville, along Main street, and over the Louisville & Portland turnpike (known as Portland avenue) to the Portland wharf. The franchises of the Lexington & Ohio Railroad, which had been extinguished by the sale to the state, were not donated; but in the act approved March 2, 1844, in which the donation was made, and which incorporated the Louisville & Portland Railroad Company as a part of the Kentucky Institution for the Education of the Blind as an agency to operate the road donated, power was given "to do and perform every act and thing necessary and proper to carry into effect the provisions of the act, and to promote the design of this corporation." It also gave in express terms the authority for the company to purchase "passenger and burden cars," and to furnish the means of transportation, and "the right to charge and exact tolls and fees from passengers, and for transporting any baggage or thing." In an amendment approved February 10, 1846, the Louisville & Portland Railroad Company was given authority to make its "said road" from any part of the city of Louisville to any part of the town of Portland, with the consent of the municipal corporations of Louisville and Portland. There were efforts to organize the Louisville & Portland Railroad Company under this law, but they were unsuccessful.

In an act entitled "An act in relation to the Louisville & Portland Railroad," approved January 9, 1852, it is recited that the company, organized under the act of 1844, had surrendered its stock and abandoned the enterprise, and the Kentucky Institution for the Education of the Blind is invested with all the rights and powers which were given in said act of 1844 and its amendments. It was given the authority to manage "the construction and use of said road and its appendages," either by its own officers, or through the president and directors of the Louisville & Portland Railroad Company, pursuant to and under a contract which said Institution for the Education of the Blind was authorized to make with that company. It was provided in the second section of this act that the location of said railroad might be made either on the line described in said act of 1844, or on such line as the Kentucky Institution for the Education of the Blind "may choose, with the consent of the city authorities of Louisville, so that it shall extend between any points on or near the river, above or below the falls, and within two miles thereof."

The town of Portland had been united with Louisville and became a part of it. In 1853 the city council gave to the president and visitors of the Kentucky Institution for the Education of the Blind its consent to the building and operating a railroad with "horse-power" to Portland wharf, over any street or streets in the city lying north of Main street and west of Twelfth street. The Kentucky Institution for the Education of the Blind, under the authority given to contract

with the Louisville & Portland Railroad Company, did, by an agreement dated April 1, 1853, transfer its right to build and operate a railroad, and all rights and franchises pertaining thereto, to that company, which had then been reorganized. The company agreed, in consideration of this transfer, to pay the Kentucky Institution for the Education of the Blind \$600 per annum, and a certain part of the net profits, should they exceed \$15,000 per annum; and did pay the \$600 for one or more years after the road was completed. Under the authority thus transferred the Louisville & Portland Railroad Company built, during the years 1853 and 1854, a railroad from Twelfth street over the Bank-street route, (part of which is in controversy,) and operated it with horse-power until the Louisville & Portland Railroad Company sold out to the Citizens' Passenger Railway Company, in 1866.

It was suggested in argument that the franchise granted by the state of Kentucky was to build and operate an ordinary steam railroad, and the city had no authority to grant the right to this railroad company to build and operate a street railway over its streets. There is now a well-recognized distinction between the franchise to build and operate an ordinary steam railroad, and the franchise to build and operate a street railway over and along the level of streets in a city. But it will be observed, in this connection, that the donation was made without the franchises of the old Lexington & Ohio Railroad Company being granted with it; and there is no grant, in terms, of the use of steam-power in operating the road donated, and certainly there is no prohibition of the use of horse-power. Indeed, whatever may have been the character of the old road on Portland avenue, which was originally built as part of the Lexington & Ohio Railroad, there can be no serious doubt of the right of the city of Louisville to indicate the power to be used in propelling cars over a new route, which could only be operated with its consent. The legislature's grant to operate another road was conditioned upon the consent of the city. This was indispensable, and certainly the city might protect the local public by limiting the "power" to be used. The Louisville & Portland Railroad Company's charter nowhere requires steam-power to be used, and the utmost that can be contended for is that the authority to use steam is implied from the character of the road donated. The charter gave authority "to do and perform every act and thing necessary and proper to carry into effect the provisions of the act and promote the design of the corporation;" and, under this authority, the Louisville & Portland Railroad Company could agree to use horse instead of steam power, even if they had the implied authority to use steam-power. We think, therefore, the Louisville & Portland Railroad Company had the legal right to the road built over the Bank-street route, and to operate it with horse-power. This was an existing right when the act entitled "An act reserving power to annul or repeal charters and other laws," approved February 14,

1856, was passed. The rights of this company may have been more than those usually embraced in a franchise to build and operate a street railway. Thus, it had a right to transport freight as well as passengers; and it may not have been obliged to have its road run on the same grade as the streets, or to change or alter its grade when the grade of the streets was changed. But, whatever these rights were, if they were greater than are usually embraced in a franchise to run a street railway, they were surrendered by a release executed by the Louisville & Portland Railroad Company to the city of Louisville, dated November 23, 1865. In that release, the Louisville & Portland Railroad Company waived and released all exemption from taxation, and other exclusive privileges and franchises, and agreed that—

"Said Louisville & Portland Railroad Company, their line of road, cars running thereon, and property connected therewith, shall be subject to the control of the general council of said city of Louisville, and the terms and stipulations contained in the aforesaid articles of agreement, (which said articles of agreement are referred to to be read as a part hereof,) in the same manner and to the same extent as the Market-street road, aforesaid, and as though the rights, privileges, and franchises of said Louisville & Portland Railroad Company were conferred by, and exclusively dependent on, said articles of agreement."

The "agreement," made part of this writing, was one between the city of Louisville and Isham Henderson and his associates, granting them the right to build and operate a street railway over Market and certain other streets in the city, and regulating the use and operation of said railway.

The learned counsel for the defendant insists that the Louisville & Portland Railroad Company surrendered all of its rights and franchises, and accepted from the city, who then had the right to grant them, all the franchises which it thereafter had; and hence its franchises are now repealable. There is some obscurity in the language of this release; but, read with the agreement which is made part of it, I think it surrendered all of its rights, privileges, and franchises which were inconsistent with the terms of the agreement between the city and Henderson and associates, and it surrendered its exemption from taxation, and the exclusive right which it claimed to build and operate a railroad west of Twelfth street and north of Main street in said city. But it did not surrender its existing road or route, nor did it surrender its right to operate it. This right had been given by the state, and, if surrendered to the city, could not have been re-granted by it. It, however, agreed to exercise its rights and operate its road as regulated by the terms of the agreement, and subject to the control of the general council. The words "*as though* the rights, privileges, and franchises of said company were conferred by, and exclusively dependent on, said articles of agreement," preclude a construction that the rights, privileges, and franchises were, in fact, "conferred by and exclusively dependent" upon the agreement.

This release was upon consideration that the city allowed Isham Henderson and associates (Henderson being the chief owner of the Louisville & Portland Railroad) the right to build and operate a road over Market street and certain other streets in said city, that were intended to connect with the Louisville & Portland Railroad, and be one system of city street railways. Subsequently, by an act approved January 9, 1866, the general assembly incorporated Isham Henderson and associates under the corporate name of "The Citizens' Passenger Railway Company." The Citizens' Passenger Railway Company, immediately after its organization, purchased the road, personal property, and franchise of the Louisville & Portland Railroad Company. The transfer was made through the Louisville chancery court, and the deed of the special commissioner is broad enough in terms to include all the property and rights which the Citizens' Passenger Railway had legislative authority to purchase.

It is important to consider and determine, at this point, exactly what the Citizens' Passenger Railway Company obtained by its purchase. The charter to the Citizens' Passenger Railway Company was given for the purpose of utilizing the previous agreement between Henderson and associates and the city of Louisville, and to unite the Louisville & Portland Railroad with the system of railways authorized by the agreement; but the powers granted were much broader, and intended to allow the system to be extended as the public necessity might thereafter require. The charter's existence was limited to 30 years by the first section, and in the second it was authorized and empowered, with the consent of the general council of Louisville, and upon terms prescribed by it, to construct, maintain, and operate single or double track street railways "in, on, over, and along" any street or streets, highway or highways, within the then or future limits of the city. In the same section, and immediately following, it is provided that "said corporation is also authorized to lease or purchase the Louisville & Portland Railroad, its franchise, and all property appertaining thereto." The corporate life of the Louisville & Portland Railroad Company was without limit, and the Citizens' Passenger Railway Company was limited to 30 years. Did this authority and the purchase under it extend the corporate life of the Citizens' Passenger Railway Company and authorize it to operate the Louisville & Portland Railroad as a corporation after the expiration of the 30 years? We think not. The Citizens' Passenger Railway Company purchased the road, and the rights and privileges attached thereto, and subject to the agreement made with the city of Louisville and others, and the franchise of the Louisville & Portland Railroad Company, which did not pertain to its own corporate functions and existence. The latter remained in the Louisville & Portland Railroad Company, and did not pass by the purchase. If the Citizens' Passenger Railway Company had leased instead of purchasing the road, it would have been quite clear that the road would have

been operated under the corporate authority given to the Citizens' Passenger Railway Company, and not under the corporate authority of the Louisville & Portland Railroad Company. I think this is equally clear, though the Citizens' Passenger Railway Company purchased, instead of leasing, the road and its property and franchises.

We have been referred to many cases in which the courts have construed acts consolidating two or more existing corporations into one, and some acts where the legislature has authorized a merger of the stock of an existing corporation into another existing corporation, and united the property and management of the two corporations into one. In these cases it has often become important to determine whether the act authorizing the consolidation or merger created a new corporation and dissolved the old ones, or whether the legislative intent was to leave the original corporation still existing, with its rights, privileges, and immunities. This is always a question of intent, to be gathered from the language of the act and circumstances surrounding each enactment. Thus, in *Railroad Co. v. Maine*, 96 U. S. 499, and *Railroad Co. v. Georgia*, 98 U. S. 359, it was determined that these acts of consolidation were new charters, and subject to amendment or repeal, although the act of consolidation gave, in terms, all of the franchise, privileges, and immunities of the old charters which were passed without the reservation of the state to amend or repeal. In *Tomlinson v. Branch*, 15 Wall. 462, and *Central R. R. v. Georgia*, 92 U. S. 665, the supreme court decided that it was not the legislative intent to dissolve the existing charters and create a new one, and hence the privileges and immunities of the original charters, which were not subject to the reserved right of the state to repeal or annul, could not be changed without the consent of the corporation. The conclusions in these cases, as in the other cases, were arrived at by a construction of the legislative act, construed by the light of the surrounding circumstances in each case.

The Citizens' Passenger Railway Company purchased of the Louisville & Portland Railroad Company its road, its rights, and privileges, and indeed all of its rights and franchises; except it did not get from it the right to operate the road as a corporation. That came from its own charter, and not by the purchase. This right being granted to the Citizens' Passenger Railway Company, with the reserved right of repeal or amendment, the state of Kentucky has the constitutional right to repeal this corporate right, in whole or in part.

Greenwood v. Freight Co. 105 U. S. 13, is a very instructive case upon this question. There the supreme court sustain as constitutional an act of the general assembly of Massachusetts which repealed the charter of a street railway company that had built and was operating its road in Boston, and authorized another company, then organized, to take its track within four months, "subject to the laws relating to the taking of land by railroad companies, and the compensation to be made therefor." The court, in its opinion, says,

"That whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter is lost by repeal. * * * It results, from this view of the subject, that whatever right remained in the Marginal Company to its rolling stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or on any of the streets, of Boston. It no longer had the right to cumber those streets with a railroad track which it could not use, for those belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter."

There is an intimation in this case that the right to use the streets for operating a street railway is not to be valued in estimating the value of the property of a railway company. This seems to be the rule in Massachusetts. *Metropolitan R. R. v. Highland Ry. Co.* 118 Mass. 290. This rule must be upon the idea that this right of way is held at the pleasure of the state, and when the right is withdrawn by the state there is nothing to value; or, where there is a right reserved in the state to allow another company to use the track upon paying compensation, this right to use the streets, given the first company, should not be paid for, as it was given for the public benefit.

The Louisville City Railway Company subsequently, in 1872, purchased of the Citizens' Passenger Railway Company all of its roads, property, and franchises; but this did not give that railway company a right which the Citizens' Passenger Railway Company had not purchased and did not have. The Louisville City Railway Company, operated the road, as well as the others purchased, under its own charter, as to the corporate right to operate a street railway, and not under either the Louisville & Portland Railroad Company's or the Citizens' Passenger Railway Company's charter. The Louisville City Railway Company's charter was passed after the act of 1856, and is therefore, like the Citizens' Passenger Railway's charter, subject to amendment and repeal.

The fact that the Louisville & Portland Railroad Company purchased of the Kentucky Institution for the Education of the Blind its right to build and operate this railroad, does not, I think, make any difference. The corporate right to operate this road as a corporation was given the Louisville & Portland Railroad Company by the state, and was not purchased by it. But if it had been purchased by it of the Kentucky Institution for the Education of the Blind, it would make no difference; since the question is whether the corporate right was authorized to be, and was, sold to the Citizens' Passenger Railway Company.

Although the Louisville City Railway Company has no right, as a corporation, to build and operate a street railway over the route in controversy, yet, if there is an existing right of way over this route, belonging either to the Louisville City Railway, its stockholders, or the mortgagee of the Citizens' Passenger Railway Company, it is property, which should be protected, and cannot be taken except by due process of law. A legislative enactment, giving this right of way

to the Central Passenger Railway Company, if it is the property of the Louisville City Railway Company, is not due process of law. The Citizens' Passenger Railway Company obtained an existing right of way over this route by its purchase, and this company continued to operate the route until it sold to the Louisville City Railway Company, June 1, 1872, except between April 1, 1868, and January 1, 1870. The road was not operated at all between April 1, 1868, and until some time in December, 1869. This was in consequence of an arrangement between the Louisville City Railway Company and the Citizens' Passenger Railway Company not to operate the road; and for this the Louisville City Railway Company paid the Citizens' Passenger Railway Company a *bonus* of \$750 per month. The Louisville City Railway Company had, and still has, a line of road along Portland avenue, which was about 600 feet north of the Bank-street route, and paid this sum to get rid of a competing road. After the purchase, the Louisville City Railway Company operated the Bank-street route only a month, and have not operated the route since July 8, 1872. Bank street, between Seventeenth and Thirty-third streets, was then unpaved; and in 1873 that part of the street between Twenty-sixth and Thirty-third streets was ordered to be paved. This was done by J. C. Dennis, with whom was Isham Henderson as a secret partner in 1873-74. The contractors took up that part of the road which was in the street which they were paving. Subsequently, perhaps the next year, another part of Bank street was paved, by order of the council, and the road in this part was taken up by the contractors. The Louisville City Railway Company sold the iron rails which were upon this entire route. This was in 1873 or 1874; and the company has never relaid any part of the track over the route in controversy. It never attempted to do anything towards re-establishing or operating this route until the summer of 1882. The company then attempted to lay cross-ties upon part of this route, but was stopped by the police of the city. This attempt was made, however, after there was a move made by another railway company to obtain the route and operate a street railway over it. The struggle then commenced for the possession and control of this route seems to have continued to the present time.

When the act of March 14, 1884, was passed, there had been a non-user of this route for nearly 12 years. The parties have taken a great deal of testimony to show the motive of the Louisville City Railway Company in this non-user. There is no controversy as to the length of the non-user; and it is clear, from the evidence, that at the time of the purchase the Louisville City Railway Company did not intend then to continue to operate the route as a street railway. Its then value to that company was that it should remain idle, and not be a competing line with the Portland-avenue road. But whether this non-user was intended to be only temporary, and to cease when the route became settled, or the general council of the city required

the route to be operated; or whether the non-user was intended to be permanent and the route abandoned as a street railway,—are questions of intent, and always difficult to determine after the event.

Mr. Davison, who was the president of the Louisville City Railway Company at the time of the purchase, and until 1878, has given his deposition; and his evidence is to the effect that the Louisville City Railway Company never intended to operate this road as a street railway again, but the right to the route was claimed because it was thought to be of some value as a connection to a bridge which the Louisville & Portland Railroad Company had legislative authority to build across the Ohio river. Mr. Davison evidently thought the Bank-street route of no value to his company as a street railway, except to destroy it, and thus prevent what he calls "cut-throat competition." He is sustained by the fact proven, that the Louisville City Railway Company made two mortgages, one in 1875 and the other in 1877, which purported to convey all of its property; and this route was not mentioned in either of them.

There is evidence to the effect that the Louisville City Railway Company was in pecuniary difficulties during most of this time, and it could not have relaid this track without very considerable outlay, and that there was no public necessity for the outlay, as the Portland-avenue road accommodated the travel.

Mr. Littel, who is and has been for years the superintendent of the Louisville City Railway Company, says that the company had the intention of relaying the track and operating the road whenever the settlements along that route were sufficient to sustain or require such a road, and states that he and Mr. Davis, who is the president of the road and has been since 1878, and who lives in New York, examined the route on two occasions to see if the settlements along the line would justify the route being relaid and operated. He explains that the iron rails sold were "T" rails, and unsuitable to be relaid on a paved street, and says that in laying a track on Bank street, between Sixteenth and Seventeenth streets, in the fall of 1876 or the spring of 1877, he put the track on the side of the street, so that it might be one of a double track when the Bank-street route was relaid. The permission to lay this track as part of another route was obtained from the city council; but the language of the ordinance, which was drawn by Mr. Littel, is such as neither to waive the old right nor claim it. Mr. Littel says that this was done intentionally.

I am of opinion that the weight of evidence is that the Louisville City Railway Company did not intend to operate this route as a street railway, and that its purpose was to abandon it as a street-railway route; and this purpose was not changed until there was a prospect of another railway getting the right to build and operate a road over this route.

The right which the state gives a street-railway company to main-

tain and operate its road over streets is a peculiar one, and in many respects unlike the right of way which one person has over the land of another. It is a right which may be given without the consent of the person who owns the fee-simple of the land over which the street runs, and without the consent of the lot-owners on the street. It is considered to be a legitimate use of a street, and is given for the accommodation of the public, and to facilitate travel. The ordinary carriage has the right of way over the street when using and traveling over it. The street car has this and something more; it has a right superior to other vehicles to run over its own tracks, and this right is exclusive as against other street cars, unless they have obtained a special right to use the tracks. Railway (street) companies have also the right to occupy the streets to an extent necessary to lay and repair their tracks. These companies, having expended money and labor in building and maintaining their roads, are entitled to a fair compensation for their use by the public; but, in estimating this compensation, no estimate of the value of the use of the street should be made, because that is given to facilitate travel and for the public benefit, and not for the private use and benefit of the railway company. *Jersey City & B. Ry. Co. v. Jersey City & H. Ry. Co.* 20 N. J. Eq. 70. The rules which apply to the non-user or abandonment of a right of way or other like easements, that are held and owned for private use and benefit, should not be applied with strictness to this kind of right, which is given and held for the public use and benefit. An abandonment should be much more readily inferred in such a case than where the easement is held and owned for private use and benefit. Indeed, I think the mere non-user of this route for 10 years, without the consent of the state or the city, should be sufficient evidence of abandonment, and authorize the state to assume that fact, and grant the right to another.

The only case we have seen which touches the point under consideration is *Hestonville R. Co. v. City of Philadelphia*, 89 Pa. St. 215. In that case, a street-railway company had the right expressly given it by the state to lay and operate a double-track railway through a part of Callowhill street, Philadelphia. The company obtained the consent of the city council and laid down a double track, and operated its road for some years. The company then took up one of the tracks, and operated its road over only one track in that street for 10 years, and then relaid the other track which it had taken up. The city of Philadelphia brought suit in equity to enjoin the company from relaying and operating its road over this double track, and the court of appeals, reversing the lower court, held that such a suit could not be sustained. It will be observed that the state took no action in the matter, and there was nothing in the facts that indicated an abandonment of a double track. The company operated its road continuously, and, in doing so, it changed from a double to a single track, and then back again to a double track. This is merely a change in

the mode of exercising a right given by the state, and is very like that of a change in the rails or cars used. The state and the city, as the representatives of the public, gave the use of the Bank-street route; and, if that right had been abandoned or lost by the action, or the non-action, of the Louisville City Railway Company, it would revert to the state as representing the public. It was proper for the state to assert its control of this right of way, if in fact it had reverted. This was a legislative act; but, if the right had not reverted by abandonment, or other cause, then the legislative department could not, by a statute, transfer a right of way which was private property from one to another. We have seen that the Louisville City Railway Company had abandoned whatever right it had to operate a street railway over these streets; and hence the state could legally grant this right to another company, for a like purpose.

The act of March 14, 1884, was necessary to give to the Central Passenger Railway Company any right to use this route for a street railway, even though the Louisville City Railway Company had no claim or right; and that act is not unconstitutional as impairing the obligation of a contract, or depriving any one of property without due process of law, for the reasons given.

The complainant, Mrs. Henderson, as the owner of the mortgage bonds issued by the Citizens' Passenger Railway Company, has no other or greater right than the Louisville City Railway Company has. She holds her mortgage lien, upon the right to use this route as a street railway, subject to the contingency that the right might be abandoned or lost by the mortgagor or its vendee. The injunction in her case was granted before the passage of the act of March 14, 1884, or the ordinance of January 25, 1884, and was granted *ex parte*, and without notice. The injunction in *Central Passenger Ry. Co. v. Louisville City Ry. Co.* was also granted *ex parte*, and without notice. I have therefore considered the questions involved as if the existing injunctions were restraining orders under the practice of this court, and the motions now made were for injunctions upon notice, after bill and answer.

In the case of *Henderson v. Central Passenger Ry. Co.* the motion to dissolve the injunction should be and is sustained. The motion for an injunction on the cross-bill of the Louisville City Railway Company is refused. In the case of *Central Passenger Ry. Co. v. Louisville City Ry. Co.* the motion of the defendant Louisville City Railway Company, to dissolve the injunction, is overruled.

TOMPKINS v. LITTLE ROCK & FT. S. RY. CO.

(Circuit Court, E. D. Arkansas. 1883.)

1. LOAN OF STATE BONDS TO RAILROAD COMPANIES—ARKANSAS ACT CONSTRUED.

The act of the general assembly of the state of Arkansas, providing for a loan of the bonds of the state to railroad companies, required the companies receiving the state bonds to pay them; and, to secure compliance with this requirement, the act created a statutory lien on the roads of the companies receiving the bonds, and this lien stands as a security for the payment of the bonds in favor of the *bona fide* holders of the same.

2. SAME—RULE FOR CONSTRUING SUCH ACTS.

The uniform and unvarying rule for the construction of statutes of this character is that all ambiguities are to be construed against the private corporation, and favorably for the rights of the state.

In Equity.

This cause first came before the court on demurrer to the bill. For a full statement of the case, and for the opinion of the court overruling the demurrer, see 15 FED. REP. 6. Upon final hearing before Mr. Justice MILLER and District Judge CALDWELL the bill was dismissed in conformity with the opinion of the former. 18 FED. REP. 344.

John McClure and John R. Dospassos, for plaintiff.

John F. Dillon and C. W. Huntington, for defendant.

CALDWELL, J., *dissenting*. I dissent from the opinion of the court in this case. I agree with the court that the decision of the supreme court of the state, holding the act under which the bonds were issued unconstitutional, does not affect the rights of the parties to this suit; and that the case of *Railroad Cos. v. Schutte*, 103 U. S. 118, is conclusive on this point. Any expression of opinion as to the soundness of the decision of the state court or its binding force on this court is therefore unnecessary. The material question in the case is whether, under the act of 1868, the state had a lien on the roads of the companies receiving the state-aid bonds to secure their payment. The decision of this question turns mainly on the construction of the seventh and eighth sections of the act. I adhere to the opinion that a sound exposition of these sections was given in the opinion on the demurrer. The views there expressed are strengthened by the facts disclosed by the evidence at the hearing. It is not my purpose to repeat the views of the circuit judge and myself expressed in that opinion, but to notice briefly the reasoning by which the learned circuit justice arrived at a different conclusion.

The meaning of the words "tax" and "taxation" in the act seems to be plain, and their use appropriate. By the laws of this state, taxes are made a lien on the property on which they are assessed. A failure to assess and collect the taxes on real property for any year or number of years, does not deprive the state of the right to have its taxes for such period afterwards assessed and collected. Omission of

lands from the tax-books is not equivalent to payment of the tax, and is not a donation of the tax to the owner. The property is bound for the tax, which ought to have been assessed and collected, in whosoever hands it may come; and when assessed for the omitted years, it is no answer to a demand for the taxes, that it was not on the tax-books for those years. *Burroughs, Tax'n*, § 93. Taxes, like the covenants of a deed, are the serfs of the soil, and follow it. *Worthen v. Badgett*, 32 Ark. 539. "By our laws, taxes are *glibæ ascripti*,—serfs of the soil,—a charge which follows the land in whosoever hands it may go. And if the tax sale may be invalid to divest the title of the former owner by reason of irregularities and failure of the officers properly to discharge their duties, yet the purchaser is subrogated to the lien of the state." *Coats v. Hill*, 41 Ark. 149. The constitutional rule that taxes must be levied by a general rule, both as to rate and mode of assessment, has no application to this case. For a valuable consideration, which they have received and appropriated, the railroad companies agreed to pay the tax stipulated in the act, and they are estopped to deny its validity. *Ferguson v. Landram*, 5 Bush, (Ky.) 230. This case is cited approvingly by the supreme court of the United States in *Daniels v. Tearney*, 102 U. S. 421, where the court says:

"In the case first cited (*Ferguson v. Landram*) an injunction was applied for to prevent the collection of a tax, authorized by an act of the legislature passed during the late civil war, to enable the people of a country to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked: 'Upon what principles of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent, or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?'"

It is not a correct interpretation of the act to say this tax was to be assessed upon an invisible and intangible corporation. It struck deeper, and fastened itself on the road. There are two views to be taken of the act in this regard, either of which is fatal to the present pretensions of the companies. The right given to the state, "by the writ of sequestration, to seize and take possession of the income and revenues" of the company to pay interest, as it accrues, and the principal of the bonds of the state, itself imports and creates a lien on the road. The "income and revenues" of a railroad company include its "earnings." In *Ketchum v. Pacific R. R.* the act provided that the county bonds loaned to the company should be paid out of the "earnings of the said Pacific Railroad." On the final hearing of that cause, at the circuit, the learned circuit judge said:

"Upon consideration of the demurrer, we held that the effect of the legislation of the state, applicable to this transaction, and the acts and contracts of the parties, was to give to the county a lien, statutable in its origin, and equitable in its nature, upon the 'earnings' of the railroad, and upon the road and franchises of the company, as (so to phrase it) the mother of the earnings.

"Aside from this, and on general principles, if the doctrine laid down by Lord Chancellor THURLOW in *Legard v. Hodges*, 3 Brown, Ch. 531, 538, 'that where parties come to an agreement as to the produce of land, that the land itself will be affected by the agreement,' and equity will specifically enforce the agreement against the party who makes it, and all persons with notice,—if this doctrine is sound to the extent stated and applied in that case, (see S. C. 4 Brown, Ch. 421,) the county is entitled to have the 'earnings' arising from the property specifically applied as provided in the second section of the act of January 7, 1865. It would become a lien or charge upon the earnings, and the road out of which the earnings must necessarily come, effectual against the company and subsequent mortgagees and purchasers with notice." 2 Story, Eq. Jur. § 1231.

The supreme court affirmed this judgment, declaring the act of 1865 constituted a contract—

"By which the state, the railroad company, and the county appropriated the company's earnings to the payment of the interest on the county's bonds, such payments to continue until the bonds were paid off by the company. No subsequent legislation could deprive the county of the security thus acquired. Nor could parties who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the act of 1865, destroy the equitable lien of the county, even with the consent of the railroad company. With this lien the property itself was chargeable, by whomsoever it or the funds accruing therefrom are or may be held." *Ketchum v. St. Louis*, 101 U. S. 318.

In this case an appropriation of the "earnings" of a railroad was held to establish a lien on the "road and franchises of the company," effective against the company and subsequent purchasers and incumbrancers, because, in the language of the learned circuit judge, the road was "(so to phrase it) the mother of the earnings." In my judgment, the opinion of the court in the case at bar is irreconcilable with the reasoning and conclusion of the supreme court and the authorities cited in *Ketchum v. St. Louis*.

But the act of 1868 goes much further than the Missouri act. The act, upon the construction of which the case of *Ketchum v. St. Louis* turned, contained no declaration that the obligation of the company to pay the county bonds should constitute a claim or lien on the road. The seventh section of the act of 1868 provides:

"The taxation in this section provided to continue until the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the state."

The legal effect of this clause is the same as if it read that the claim or lien of the state on the road should not be discharged until the bonds were paid. It is immaterial whether the affirmative or negative form of expression is used; the intention is clear and the legal effect the same. It plainly shows the contracting parties must have intended and agreed there was a lien; and the courts will give effect to that intention, though not expressed in the most approved legal formula. It is the intention of the parties and not their grammar that courts look to in construing a contract. It is sufficient to

create a lien or mortgage that it appears in any part of the statute or contract, and by any form of expression, that it was the intention that it should have that effect. No special technical terms are required to constitute a mortgage or give a lien. 1 Jones, Mortg. § 166; *Whiting v. Eichelberger*, 16 Iowa, 422; *Johnson v. Crofoot*, 53 Barb. 574; S. C. 37 How. Pr. 59; *Weed v. Standley*, 12 Fla. 166; *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472; *Jackson v. Carswell*, 34 Ga. 279. When it is said that upon the payment by the company of the principal and interest of the state bonds, "the road shall be entitled to a discharge from all claims or liens on the part of the state," it is necessarily implied that the state has a lien on the road to secure the payment of her bonds, which is not to be discharged until they are paid. What is implied in a statute or contract is as much a part of it as what is expressed. The assertion that the word "lien" in the act is not used "in any clear or accurate sense," is not supported by any fact or argument to justify the reflection implied by it on the legislature that passed the act, or the people who ratified it by their votes at the polls.

It is a presumption of law that every clause and word of a legislative act was intended to have some reasonable meaning and effect, and it is the duty of the court to diligently search out such meaning and give it effect. Recognizing this rule, and the necessity of giving some meaning to the clause of the act in question, it is said that the words were used out of abundant caution to show the state would have no claim on the company after it had paid all the state bonds issued to it, and that there could have been no thought in the minds of the legislature that they were, by this clause, establishing a lien not already created. It is probably true that the legislature that submitted this act to the people for their ratification was not composed of the most enlightened men of the country, but it is safe to assert that there was not a man in that body who did not have intelligence enough to know that it was not necessary for the legislature to declare that the state should not have a claim or lien on a railroad for a debt after it had been fully paid; nor was there a man in that body who did not know there was no occasion for the legislature to declare that "the said road shall be entitled to a discharge from all claim or lien on the part of the state, if the state had no 'claim or lien' on the 'road.'" The construction placed on this clause by the court would make it vain and ridiculous. Such an interpretation is never placed on a statute when it is susceptible of any other. The legislature obviously supposed the right of the state "by writ of sequestration to seize and take possession of the income and earnings of said company," until the state bonds were paid, created a lien on the road, but out of abundant caution that purpose and intention found expression in terms in this clause, and its force and effect is not to be gotten rid of by a suggestion that the legislature did not use the word "lien" in any intelligible sense, and that the word "road" was

used for "company" for the sake of euphony. This argument is not consistent with itself; for, while it asserts the legislature did not possess intelligence enough to use the word "lien" in any clear sense, it at the same time assumes that that body was so mindful of the rules of grammar that the word "road" was used for "company" solely to avoid the repetition of the latter word. When referring to the obligations and promises to the state of the corporations receiving the bonds, the word "company" is rightly used, but the "lien" is appropriately located on the "road." Material words in a statute or contract, the meaning of which is understood by every man of common intelligence, are not to be stricken out on vague surmises. To do so is to make a new contract for the parties, instead of construing the one they made. Courts are forbidden to take such liberties with statutes or contracts.

But supposing the meaning of the act to be doubtful, what is the rule for its construction? Is it to be construed most strongly against the state or the company? If there is doubt, is the state or the company to receive the benefit of that doubt? These questions are answered in repeated judgments of the supreme court of the United States. The uniform and unvarying rule for the construction of statutes of this character is that they are to be construed strictly against the corporation and liberally in favor of the state. In a statute like this all ambiguities are to be construed against the private corporation and favorably for the rights of the state.

A few cases will be cited in illustration of this rule. Congress passed an act, making a grant of lands to the territory of Iowa, to aid in improving the navigation of the Des Moines river. A question arose as to the extent of the grant, which was referred to Judge BLACK, then attorney general, for his opinion. In the course of his opinion on the question he said:

"But for my own part, I have not the least doubt about it. My reason may seem paradoxical, but the very obscurity of the grant, in my judgment, makes it clear. It is out of these doubts that certainty grows. In every doubtful case we know very well what we ought to do as soon as we ascertain which party is entitled to the benefit of the doubt. We shall see who is entitled to it here. It is well settled that all public grants of property, money, or privileges are to be construed most strictly against the grantees. Whatever is not given expressly, or very clearly implied, from the words of the grant, is withheld. This is most especially true of legislative grants; and for very good reasons the rule ought to be adhered to with unyielding firmness. We all know the fact, and we are not bound to seem ignorant of it, that gifts like this are often caused by private solicitation and personal influence. The bills are almost universally drawn up by their special friends, and may be made ambiguous on purpose to disarm their opponents, or put suspicion asleep. If you let the grantees have the advantage of the ambiguity which they themselves put into their own laws, many of them will get a meaning which congress never thought of. Acts which were supposed to have but little in them when they passed, will expand into very large dimensions afterwards. An ingenious construction will make that mischievous which was intended to be harmless. The remedy for these evils—and they are evils

to the public morals as well as to the treasury—is to let all men know that they can get nothing from the United States except what congress has chosen to give them in words so plain that their sense cannot be mistaken.” 9 Op. Attys. Gen. 275.

These views of Judge BLACK have the high sanction of the supreme court of the United States. A case involving the construction of the same act came before that court for decision and was argued for the United States by Judge BLACK. In deciding the case the court held the grant stood “on the same footing of a grant by the public to a private company,” and that all such grants “are strictly construed against the grantees.” The language of the court, in deciding that case, is strictly applicable to the case at bar, and would seem to be decisive of it. The court said:

“We concur with the following citation and reasoning of the plaintiff’s counsel, to-wit: ‘Lord ELLENBOROUGH, in his judgment in *Gildart v. Gladstone*, 1 East, 675, (an action for Liverpool dock dues,) says: If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was intended.’ The reason of the above rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms.” *Dubuque & P. R. Co. v. Litchfield*, 23 How. 88, 89.

It will be observed that the rule we are considering is here applied to the case of a grant of lands by the United States to one of her territories. A territory is itself a public corporation, and might fairly be presumed to be incapable of lobbying and “private solicitation;” but, for the purpose of applying the rule, the court treated it as a “private company.” In the case at bar private corporations are the beneficiaries of the act, and the rule and the reasons for it apply with all their vigor. Where a corporation claimed it was exempt from the obligation to pay taxes, the court said:

“The rule of construction in this class of cases is that it should be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.” *Fertilizing Co. v. Hyde Park*, 97 U. S. 666.

In an earlier case the court used this language:

“The grant of privileges and exemptions to a corporation is strictly construed against the corporation and in favor of the public. Nor does the rule rest merely on the authority of adjudged cases. It is founded in principles of justice, and necessary for the safety and well-being of every state in the Union. For it is matter of public history, which this court cannot refuse to

notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter. * * * And if individuals choose to accept a charter in which the words used are susceptible of different meanings,—or might have been considered by the representatives of the state as words of legislation only, and subject to future revision and repeal, and not words of contract,—the parties who accept it have no just right to call upon this court to exercise its high powers over a state upon doubtful or ambiguous words, nor upon any supposed equitable construction, or inferences made upon other provisions in the act of incorporation." *Ohio Life I. & T. Co. v. Debolt*, 16 How. 435, 436.

And see *Slidell v. Grandjean*, 111 U. S. 437; S. C. 4 Sup. Ct. Rep. 475.

This rule applies in every case where a private corporation seeks to obtain the property, money, or bonds of the state, or, having obtained the same, disputes the obligations it incurred in obtaining them. The constitution of 1868, under which the act was passed, provided the credit of the state should never be loaned for any purpose without the consent of the people expressed through the ballot-box. The legislature could do nothing in fact but submit to the people the proposition of the railroad company to borrow the bonds of the state. The contract was not made between the legislature and the companies, but between the legal voters of the state and the companies at the ballot-box. As we have seen, the court will take judicial notice of the fact that such bills are drawn, originally, by the parties interested in the scheme of the bill, and that it is to be construed in the light of this fact. In this case the active agency of the railroad companies continued beyond the passage of the bill by the legislature. To impart any validity to the scheme it had to be approved by the people at the ballot-box, and what was done to secure this result is part of the public history of the country, of which the court will also take judicial notice.

In *Daniels v. Tearney*, 102 U. S. 418, the court, in construing an ordinance of a convention, said:

"The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them." *Brown v. Piper*, 91 U. S. 37.

And in *U. S. v. Union Pac. R. Co.* 91 U. S. 79, it is said:

"But courts in construing a statute may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." *Aldridge v. Williams*, 3 How. 24; *Preston v. Browder*, 1 Wheat. 120.

It is part of the public history of the time that the promoters of this scheme represented to the people of the state, through the public prints and otherwise, for the purpose of influencing them to vote for the bonds, that the state would have a lien on the roads and franchises of the companies, receiving the state-aid bonds to secure their payment. It would be discrediting to the court to affect ignorance

of the known public fact in the history of the state that these representations were made, and that they were based on the language of the act which was quoted to prove there was a "lien" on the "road" that was not to be discharged until the state bonds were paid.¹ These are public historical facts known to every citizen of the state who lived at the period of their occurrence, and the evidence of which is extant in the columns of every public journal of the time. It was known then, as well as it is now, that to loan the bonds of the state to the companies, without reserving a lien on their roads, would be tantamount to a donation of the bonds to the companies receiving them. If the language of the act is ambiguous, the ambiguity is to be attributed, as we have seen, to the railroad companies receiving bonds under the act, and not to the people; and if these corporations used ambiguous words, knowing the people would take them to mean one thing, intending when the question came before the courts to contend that they meant something else, they are bound by the sense in which they intended the people should understand them. The opinion of the court fails to notice these canons for the construction of acts like this. They are founded on experience and a knowledge of the agencies by which such acts are usually brought into existence, and are well calculated to lead to a just and intelligent interpretation of them. They have the high sanction of the supreme court of the United States, and this court is bound to give effect to them. They are applicable to the statute under consideration, and remove the doubts, if any, as to its meaning. The money derived from the sale of the state bonds built, or aided to build, the road. The bonds were confessedly loaned for that purpose upon the agreement of the company to provide the means to pay them; and the question whether the act gives the state a lien on the road to secure compliance with the company's agreement to pay the bonds is certainly not to be determined by the application of rules as narrow and technical as any that would be applied to test the sufficiency of a plea in abatement.

To support the contention that the act of 1868 created no lien on the roads, reference is made to the act of March 18, 1867. The fifth section of that act provided that the receipt by any railroad company for the bonds loaned to it by the state should operate as a lien and mortgage on the road of any company receiving the bonds. It is said this act was repealed by the act of 1868, and from this premise

¹The Little Rock *Republican*, the official newspaper of the state, in its issue of October 26, 1868, (the election was on the third day of November following,) contained this article: "The people are never to be taxed to pay any of these bonds, or any part of their contemplated state aid; the railroad companies having received such aid, must pay the interest, as well as the principal, of the same, as provided by section 7 of said act. The state simply becomes indorser, and only so, so far as the bonds are issued, which will be upon the roads actually completed; and in case of failure of any road to pay interest and principal, as provided in section 7, then the state will have the road and franchises for security, as provided in section 8."

it is argued that it had been found that companies would not accept the state bonds and secure their payment by a mortgage on their roads, and hence the repeal of that act and the passage of the act of 1868, omitting the fifth section of the act of 1867. A sufficient answer to this contention is found in the fact that the act of 1867 does not contain the provisions of the seventh section of the act of 1868, and that that section, so far as relates to a lien on the road, is in legal effect the equivalent of section 5 of the act of 1867. The reference to the act of 1867, assumes that that act, and the act of 1868, are to be viewed as though the state was then in its normal condition, and the second act was passed as a substitute for the first after it had been ascertained the first was deficient. The facts of history show the premises and deduction are without foundation in fact. In 1864 the Union men of the state, then within the federal military lines, by their own voluntary action, delegated some of their number to form a constitution. The constitution so formed was nominally submitted to a vote of the people of the state, but there was no pretense of an election elsewhere than inside the picket lines of the half dozen federal military posts in the state. The war was still flagrant, and outside of these military posts the confederate authority dominated. The skeleton of civil government thus formed was without means, was not recognized by congress, and depended for its existence on the bounty and forbearance of the federal military authorities. Its legislature twice elected senators to the congress of the United States, who were refused admittance on the distinct ground that there was no lawful state government in Arkansas. Senators elected by the legislature that passed the act of 1867 were rejected on that ground. It grew to have a little more consistency, but its fate at all times was uncertain and doubtful. Finally, congress, by act of March 2, 1867, (14 St. 428,) declared "no legal state government, or adequate protection for life or property, now exists in the rebel state of Arkansas," (and other states named,) and that it "is necessary that peace and good order should be enforced in said states until loyal and republican state governments can be established." And to effect this object the act provided "that said rebel states shall be divided into military districts, and made subject to the military authority of the United States, and for that purpose * * * Mississippi and Arkansas shall constitute the fourth district."

It will be observed that the act of congress declaring "no legal state government existed" in the state of Arkansas, and providing a military government for the state, was passed on the second of March, 1867, and the railroad act on the eighteenth of March, 1867; so that 16 days before the act of 1867 was passed by the legislature, the whole state government had been denounced by act of congress as illegal, and a military government provided for the state. From the time the act of 1867 was passed until the adoption of the constitution of 1868, military authority was paramount. Apprehension,

doubt, and distrust prevailed on every hand, and credit was prostrated. It would have been futile to attempt the construction of any work of internal improvement during this period. It was not attempted. Nor was this all. The state, in 1836, issued a large amount of bonds. Neither principal nor interest of a large portion of these bonds was ever paid, and the state had occupied the attitude of repudiating her debts for a period of more than 30 years. This deprived it of credit, and rendered its bonds comparatively worthless. New bonds, issued under the act of 1867, would have had no value whatever in any market, because, in addition to the low condition of the state's credit, there was the fact that, before the passage of the act of 1867, the body that passed it had been declared to be illegal by act of congress, and, after the passage of the act, forbidden to continue its session, by a military order. See House Journal 1867, p. 1007. The popular opinion at the time was universal that the acts of this government were nullities. The act was a dead letter from the moment of its enactment, for the reasons mentioned, and not because it provides for a mortgage on the roads.

The legislature that passed the act of 1868 was assembled under the constitution framed and adopted that year under the operation of the reconstruction acts. Between that government and the government which passed the act of 1867 there was not the least continuity or kinship. Probably no constitution and code of laws were ever adopted with so little reference or regard to the constitution and laws that preceded them.

There is, therefore, no foundation for the contention that the act of 1867 was regarded in framing the act of 1868, or that it throws any light on the proper construction of the latter act. The legislature that passed the act of 1868 provided for funding the hitherto repudiated bonds of the state, and made ample provision for paying the interest thereon. This action had the effect to restore the credit of the state, and its bonds, for some time thereafter, approximated par, and it was then, and not before, that the railroad companies sought the loan of the bonds to aid them to construct their roads. Nor did the act of 1867 remain in force until the passage of the act of 1868. It was abrogated before that by that provision of the constitution of 1868 which declared the credit of the state should not be loaned for any purpose without the consent of the people at the ballot-box,—a provision not contained in the act of 1867 or the constitution under which it was enacted.

As to the effect of the act of 1869, I have nothing to add to what is said in the opinion on the demurrer. Both were public acts, and all persons were bound to take notice of the lien accruing to the state under them. *Memphis & Little R. R. Co. v. State*, 37 Ark. 642; *Ketchum v. St. Louis*, *supra*. The statutes relating to the registry of mortgages have no application to a lien created or arising under a public statute in favor of the state.

The defendant company, now owning the road, is in no plight to set up the plea of innocent purchaser. It acquired the road by purchase at a sale made under a decree foreclosing a mortgage executed by the old company to secure its own bonds, after the award of state aid, and the lien of the state had attached under the act of 1868. The bill filed in that case set out the fact of the award of state aid, and the receipt of the state bonds by the company under the act of 1868, and that the road had been placed in the hands of a receiver under the provisions of the act of 1869, and one of the prayers of the bill was that the mortgaged property might "be sold subject to the lien of the state of Arkansas," if such lien was found to exist, and to be prior to that of the mortgage set out in the bill. The state was not a party, and could not be made such, and, no bondholder intervening, it was not possible to adjudicate the question in that case. The purchaser at the foreclosure sale was bound to take notice of all liens, the existence of which were disclosed in the bill. *Brant v. Virginia Coal Co.* 93 U. S. 326. At the foreclosure sale the present company, or parties acting for it, purchased the property, consisting of 100 miles of completed and equipped railroad, for \$50,000. The difference between the amount of the bid and the value of the property is suggestive. To the construction of this property, thus bid in for \$50,000, the state contributed, by loan of her bonds, the sum of \$1,000,000. That the purchase was made subject to the prior lien of the state is not left to conjecture. The decree confirming the sale declares that the new company shall, as part of the consideration of the conveyance to it of the mortgaged property, "compromise or pay such claims against the Little Rock & Fort Smith Railroad Company as C. W. Huntington, George Ripley, and Henry A. Whitney may, within one year from the date hereof, approve, and upon such terms and in such manner as they may prescribe, subject to the approval of this court." It appears Gookin, Page, and others presented to the committee, named in the decree of confirmation, claims for money advanced by them to pay interest on the state-aid bonds, issued to the Little Rock & Fort Smith Railroad Company. On the ninth of December, 1875, the committee filed their report on these claims, in which they say:

"Prior to the first day of January, 1871, the state of Arkansas loaned its credit to the Little Rock & Fort Smith Railroad Company to the extent of \$800,000 of its 7 per cent. currency state-aid bonds, issued under the act approved July 21, 1868, entitled 'An act to aid in the construction of railroads.' * * * It was the duty of the company, under the act, under penalty of sequestration of its income and revenues, to furnish the money requisite to pay this interest, but no provision had been made to that end. * * * In order to avoid the penalty of sequestration, which would increase the complications then existing, and render it much more difficult to relieve the company from its embarrassment, certain persons advanced the moneys, and paid to the state of Arkansas said sum of \$28,000, with which the coupons upon said \$800,000 state-aid bonds, payable April 1, 1871, were paid. * * * These advances were made to meet a pressing emergency. The old company

was relieved from a debt which threatened a sequestration of its income, and the new company, [the present defendant,] when it comes to settle with the state, will receive credit for the amount thus paid. In fact, every member of the new corporation equally enjoys the benefit of this payment, and it is not just that a few persons should be compelled to bear the burden which all should carry."

The significance of this report, which was confirmed by the court, is enhanced by the fact that the chairman of the committee making it was a trustee by substitution in the mortgage executed by the old company, and as such was a party complainant in the suit in which that mortgage was foreclosed, and, as attorney for the trustees, filed the bill and procured the decree of foreclosure in that suit, and continued to act as a trustee and attorney for the new company. These facts are a guaranty that the report was not the result of imperfect information, or hasty and inconsiderate action. It was the work of one familiar with all the facts, and the law applicable to them, and in view of his relation to the parties it is safe to assume it expressed their understanding at the time. The language of the report, that "the new company, when it comes to settle with the state, will receive credit for the amount thus paid," conclusively shows that the present defendant purchased, expecting to pay off the state-aid bonds as a prior lien. This is further confirmed by the fact that the new company, between the date of its organization and the date of the decision of the supreme court of the state, in June, 1877, holding the act under which the bonds were issued unconstitutional, purchased in state-aid bonds to the amount of \$627,000, exclusive of interest, which bonds it now holds. These bonds were obviously purchased to be used in extinguishing the state lien. The defendant is unable to give any other explanation of their purchase. The indefinite and unsatisfactory statement in the answer that the defendant "did buy and invest a part of its corporate funds" in these bonds "as an asset," is equivalent to a confession of the charge in the bill that they were purchased to be used in discharging the state lien.

It is immaterial whether the security given by the companies to the state was given in terms for the latter's indemnity, or for the absolute payment of the bonds. If it was given to the state for her indemnity, as accommodation maker of the bonds, equity will treat it as a pledge for the payment of the bonds, and will compel its application to that purpose. This principle is now too well settled to admit of doubt or discussion. *Sheld. Subr.* §§ 155, 163; *Moses v. Murgaroyd*, 1 Johns. Ch. 129; *Rice's Appeal*, 79 Pa. St. 206; *Hand v. S. & C. R. Co.* 12 S. C. 314; *Kelly v. Trustees*, 58 Ala. 498; *Cott v. Barnes*, 64 Ala. 108; *Young v. Montgomery & E. R. R.* 2 Woods, 606; *Holland v. State*, 15 Fla. 455; *Florida v. Florida Cent. R. Co.* Id. 723; *Hampton v. Phipps*, 108 U. S. 260; S. C. 2 Sup. Ct. Rep. 622.

The justice and equity of this rule finds its readiest illustration and application in cases where the maker of accommodation paper

who has taken security from the principal debtor for the payment of the debt becomes insolvent. In such cases equity will subrogate the holder of the debt to the security held by the accommodation debtor. In the case at bar the principal debtor is in the attitude of repudiating her accommodation bonds, and it would be in the highest degree inequitable and unjust to deny to the innocent holders of those bonds the benefit of the security the state holds for their payment.

This doctrine was not denied by the court in *Chamberlain v. St. Paul R. Co.* 92 U. S. 299. The holder of the state bonds failed in that case because the state had foreclosed the lien taken for its indemnity, and sold the property to innocent purchasers, long before the bondholder instituted his suit. The court held the purchasers from the state were unaffected by the constructive trust relation existing between the state and the holders of its bonds. The case went off on the ground that "where the property is not affected by any specific lien or trusts in the hands of the state, her transfer will pass an unincumbered estate;" and on the additional ground of lapse of time.

In the case at bar the state has not parted with the security to an innocent third party, and is not in possession of the property. The property is within the jurisdiction, and may be made to respond to a decree of the court without affecting injuriously the rights of the state. If the state was suable, it would be a necessary party; but the fact she cannot be sued does not prevent the bondholder from asserting his equity against the property which can be reached. As between the state and the railroad company, the state is to be regarded as a surety, and the company the principal debtor. The bonds are the accommodation paper of the state loaned to the company for its accommodation. The security is given and is to continue "until the amount of bonds issued to such company, with the interest thereon, shall have been *paid by said company*." This is a covenant for the payment of the bonds by the company, and the statutory lien stands as a security for that purpose to every holder of the bonds. The security was designed, and by the express terms of the act appropriated, exclusively to the payment of the principal and interest of the bonds. No provision was made for the state to pay the bonds in any contingency. In *Railroad Cos. v. Schutte* 103 U. S. 118, it is distinctly held that where the lien was given to the state to secure the payment of its bonds a holder of the bonds could avail himself of that security independently of the doctrine of subrogation. That case is also conclusive upon the point that the invalidity of the act under which the bonds were issued cannot avail the company as a defense.

The latter doctrine had previously been established by that court in *Daniels v. Tearney*, 102 U. S. 421, where it is said to be well settled "that where a party has availed himself, for his benefit, of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although

such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such case the principle of estoppel applies with full force and conclusive effect. *Ferguson v. Landram*, 5 Bush, (Ky.) 230. See *Same v. Same*, 1 Bush, (Ky.) 548; *Van Hook v. Whitlock*, 26 Wend. 43; *Lee v. Tillotson*, 24 Wend. 337; *People v. Murray*, 5 Hill, 468; *City of Burlington v. Gilbert*, 31 Iowa, 356; *Burlington, C. R. & M. R. Co. v. Stewart*, 39 Iowa, 267." To this list of cases cited by the court may now be added *Railroad Cos. v. Schutte*, *supra*, and *Jamison v. Griswold*, 2 Mo. App. 150; S. C. 6 Mo. App. 405.

The plaintiff is entitled to a decree.

The principles here announced apply to the case of *Williams v. Little Rock, M. R. & T. Ry.*

MARLOR v. TEXAS & P. R. CO.

(Circuit Court, S. D. New York. August 26, 1884.)

1. PAYMENT—PROMISE TO PAY IN MONEY OR EQUIVALENT—TIME OF PAYMENT—ELECTION.

Where a promise is in the alternative, to pay in money or in some other medium of payment, the promisor has an election either to pay in money or the equivalent, and after the day of payment has elapsed without payment, the right of election on the part of the promisor is gone, and the promisee is entitled to payment in money.

2. SAME—RAILROAD BONDS—PAYMENT OF INTEREST IN MONEY OR SCRIP—ACTION TO RECOVER INTEREST.

By the terms of bonds issued in 1875, by the Texas & Pacific Railroad Company, the company acknowledged itself to be indebted to the holder in the sum named therein, which it promised to pay to ———, or assigns, at the office of the company in New York, on the first day of January, 1915, with interest thereon at 7 per cent. per annum, payable annually on the first day of July of each year, as provided in the mortgage on the lands of the company, and upon the net income derived from operating its road east of Fort Worth, by which payment was secured. The bonds further provided that in case such net earnings should not, in any one year, be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip might, at the option of the company, be issued for the interest, such scrip to be received at par and interest, the same as money, in payment for any of the company's lands, at the ordinary schedule price, or it might be converted into capital stock of the company when presented in amounts of \$100 or its multiple. The mortgage was silent as to payment of interest or principal, except that it authorized the trustees to sell the lands if default was made in the principal sum at maturity of the bonds, and apply the proceeds to satisfy the amount due. *Held*, that the mortgage did not qualify or control the absolute promise in the bonds to pay interest in money or in scrip; that the bondholders were entitled to payment of interest in money, if earned, or, if it was not earned, to the scrip, on the day at which, by the terms of the bonds, the company was to pay the interest, or exercise its alternative; and that after that day had elapsed, without an election by the company, they were entitled to be paid in money, and could maintain an action to recover the same, although no presentment of the bonds or demand of payment had been made.

At Law.

Dos Passos Bros., for plaintiff.

Dillon & Swayne, for defendant.

WALLACE, J. This case has been tried before the court without a jury. The plaintiff is the owner of 150 bonds of the defendant, for \$1,000 each, and sues to recover two installments of interest thereon: one of \$10,500, payable July 1, 1882, and one of \$10,500, payable July 1, 1883. The bonds are part of an issue of 8,857 bonds created by the defendant in 1875, and known as "Income and Land-grant Bonds." They are secured by a mortgage, which is a first lien on 7,600,000 acres of land of the defendant, and also upon the net income arising from operating defendant's lines of railroad east of Fort Worth, after paying interest on prior mortgages thereon.

By the terms of the bond the defendant acknowledges itself to be indebted to the holder in the sum of \$1,000, "which sum the company promises to pay to ——— or assigns, at the office of the company, in the city of New York, on the first day of January, 1915, with interest thereon at the rate of 7 per cent. per annum, payable annually on the first day of July of each year, as provided in the mortgage hereinafter mentioned." After reciting that the payment of the bond is secured by a first mortgage of even date therewith upon the lands of the company, and also upon the net income of the company derived from operating its railway east of Fort Worth, the bond contains the following conditions:

"In case such net earnings shall not, in any one year, be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par and interest, the same as money, in payment for any of the company's lands, at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of \$100 or its multiple."

The mortgage is silent respecting payment of interest or principal, except that it authorizes the trustees to sell the mortgaged lands if default is made in the principal sum at maturity of the bond, and apply the proceeds to satisfy the amount due.

The rights and obligations of the parties in an action upon these bonds were incidentally considered by this court upon a motion in this case to strike out certain parts of the answer of defendant. 19 FED. REP. 867. Upon that motion it was intimated that the plaintiff was entitled to recover the installments of interest unpaid, unless the defendant could show that it had not made net earnings sufficient, and had exercised its option to issue scrip in lieu of paying interest in money. It was not intended, upon an interlocutory motion, to foreclose the defendant from contesting fully its liability upon the trial of the action; and accordingly it has been strenuously insisted for the defendant that the interest is not payable in money; that the bond is an income bond on which interest accumulates, but is not payable

until earned; and if not earned the bond is satisfied by payment in scrip.

The elaborate argument upon the trial has not changed the opinion previously entertained, that there is nothing in the language of the mortgage which controls or qualifies the absolute promise in the bond to pay interest in money or in scrip. The mortgage deals only with the subject of the security, which is to belong to the bondholders as collateral to the obligation, and with their auxiliary rights and remedies for enforcing the promise in the bond. If the bonds are to bear the construction claimed by the defendant, the bondholders for 40 years, instead of being creditors of the company, are practically only preferred stockholders, with the privilege of exchanging their stock for the lands of the company. It would be a misnomer to call such instruments bonds. There is a plain promise to pay interest annually, and nothing to lead a purchaser to suppose that he is not to have his interest or scrip instead, at the election of the defendant, if the net earnings of the railway are not sufficient to pay the interest. If the interest is earned, the holder cannot be put off with scrip. If it is not, he may be, at the election of the company. The plaintiff was entitled to his money or the scrip, its substitute, on the day at which, by the terms of the bond, the defendant was to pay the interest or exercise its alternative. It is elementary that when a promise is in the alternative, to pay in money or in some other medium of payment, the promisor has an election either to pay in money or in the equivalent, and after the day of payment has elapsed without payment the right of election on the part of the promisor is gone, and the promisee is entitled to payment in money. For various illustrations of the rule, see *McNitt v. Clark*, 7 Johns. 465; *Gilbert v. Danforth*, 6 N. Y. 585; *Stephens v. Howe*, 2 Jones & Sp. 133; *Stewart v. Donnelly*, 4 Yerg. 177; *Choice v. Moseley*, 1 Bailey, 136; *Butcher v. Carlile*, 12 Grat. 520; *Church v. Feterow*, 2 Pen. & W. 301; *Trowbridge v. Holcomb*, 4 Ohio St. 38; *Perry v. Smith*, 22 Vt. 301; *Mettler v. Moore*, 1 Blackf. 342.

The option in the bond was evidently intended for the benefit of the defendant, and to enable it to substitute scrip for money in case its net earnings, or other resources, were not such as to permit it providently to pay in money. There is no reservation, in terms or by implication, of a right to exercise the option after the day of payment, and that day having elapsed without an election by the defendant, the bondholders are entitled to be paid in money.

Upon the trial it appeared that there was no formal presentment of the bonds in suit for payment of interest on the first day of July, 1882, or on the first day of July, 1883, but it was shown that shortly after each of those days the treasurer of the defendant, at the defendant's office, notified holders of the bonds that the defendant was not prepared to pay the interest, as the earnings of the railway had not been sufficient, and that no action had been taken by the defendant

in reference to the issue of scrip. Before the commencement of this suit, induced by the suggestion that suits were about to be brought to recover the interest on the bonds, and on or about the twelfth day of October, 1883, the directors of the defendant adopted a resolution providing for paying the interest in scrip. Notice of this action on the part of the defendant was given to the plaintiff, and to the bondholders generally, by publication. It is insisted for the defendant that the defendant is not in default until a demand by the plaintiff, and, no valid demand having been made, the plaintiff should fail in his action. Neither presentment nor demand is a prerequisite to a right of action for the recovery of the interest. Neither is necessary when there is a promise to make payment at a specified time. It devolves upon the debtor to prove payment or readiness to pay. There is no distinction in this respect between notes and negotiable bonds. *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555; *Philadelphia & B. R. Co. v. Johnson*, 54 Pa. St. 127. And the rule applies also to notes payable in specific articles. *Elkins v. Parkhurst*, 17 Vt. 105; *Wiley v. Shoemaker*, 2 G. Greene, (Iowa,) 205.

If the defendant had been prepared to deliver the scrip when the interest matured, it would have complied with its agreement, and been absolved from liability. The law does not usually require the doing of a vain thing, and, after the defendant had announced that it could not pay the interest, and was not prepared to issue the scrip, it would have been a nugatory and perfunctory act on the part of the plaintiff, when he was entitled absolutely to his money, to make a formal presentment of his bonds and a formal demand of payment.

Judgment is ordered for plaintiff for \$21,000, with interest on \$10,500 from July 1, 1882, and on \$10,500 from July 1, 1883.

In re SHONG TOON.

(District Court, D. California. August 20, 1884.)

1. CHINESE IMMIGRATION—ACTS OF 1882—CHINESE LABORER RETURNING TO UNITED STATES—FAILURE TO OBTAIN CERTIFICATE—EVIDENCE.

In the case of Chinese laborers who left the United States after the law of 1882 went into effect, and before the passage of the law of July 5, 1884, evidence tending to excuse their failure to obtain custom-house certificates cannot be received. The terms of the act of 1884 expressly forbid the reception of any evidence of the right to re-enter other than the certificates required by the law.

2. SAME—CONSTRUCTION OF ACT OF 1884.

Chinese laborers whose coming to the United States is not suspended by the act of 1884, are (1) those who were in this country at the date of the treaty of November 17, 1880, or have come before August 6, 1882; and (2) those who, having departed after the passage of the act of 1882, shall produce the evidence required by the act of 1884.

Habeas Corpus.

S. G. Hilborn, U. S. Atty., and Carroll Cook, Asst. U. S. Atty.,
for the United States.

Thos. D. Riordan, for petitioner.

HOFFMAN, J. The petitioner in this case is a Chinese laborer who left this state some two months after the law of May 6, 1882, went into operation. He does not produce the custom-house certificate required by that law, nor did he procure one. He seeks to explain and excuse his failure to obtain it by evidence tending to show that on the day of his departure three steamers sailed from this port for China; that the number of passengers on these steamers was very great; that he, together with many others, repaired to the custom-house to obtain certificates; that the applicants were admitted singly, but that, long before he and some others could obtain admittance, the doors of the office were closed, and he and his companions were left to choose between embarking without a certificate or losing their passage money. The district attorney objected to the admission of this testimony. It was received provisionally, subject to the objection.

The question is thus presented whether, in the case of Chinese laborers who left the United States after the law of 1882 went into effect, and before the passage of the recent law of July 5, 1884, any evidence tending to excuse their failure to obtain a custom-house certificate can be received. Under the provisions of section 4 of the recent act of July 5, 1884, it would seem plain that no such evidence could be received. That section provides for the issuance of a certificate to the departing laborer substantially as prescribed in the act of 1882. Its form is modified, however, in some particulars, not necessary here to enumerate. With regard to this certificate the law prescribes in explicit terms: "Said certificate shall be the only evidence permissible to establish his [the laborer's] right of re-entry." Of course, the production of the certificates prescribed by the law of 1884 cannot be exacted of laborers who left the United States before its passage, and who obtained from the custom-house the certificates required by the existing law at the time of their departure. But the clause of the act of 1884 is cited to show the intention of congress to exact of all laborers who should depart after the law went into effect, the production, on their return, of the certificate therein prescribed as the indispensable condition of their right of re-entry. The same policy is observable in the provision of the sixth section with regard to Chinese persons other than laborers, "who shall be about to come to the United States." They are required to obtain a "permission," etc., "of the Chinese government," etc., "which certificate shall be vised by the diplomatic or consular representatives of the United States," etc. "Such certificate, vised as aforesaid, * * * shall be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States." If these provisions should be deemed to apply to every person other than a laborer who

shall be about to come to the United States, according to the literal terms of the enactment, the position of the resident Chinese merchants who may desire to visit British Columbia, or Mexico, or the Sandwich Islands, is much more unfavorable than that of the laborer; for the latter may obtain a custom-house certificate entitling him to re-enter the United States, while the former can only return on the production of the certificate issued by the "Chinese or other government of which he is a subject, viced by the representative of the United States."

Congress has unmistakably adopted with respect to Chinese immigration a policy of great rigor, and as the last act was passed but little more than two years after the passage of the act of 1882, that policy cannot be overlooked in determining the true intent and meaning of the earlier enactment. By the treaty of November 17, 1880, it was provided that "*Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, and immunities,*" etc. The rights thus solemnly guarantied by treaty stipulation were recognized and even extended by the act of 1882. The first section of that act provides in general terms for the suspension of the right of Chinese laborers to come into the United States from and after the expiration of 90 days next after the passage of the act. The second section imposes certain penalties on masters of vessels who shall knowingly land Chinese laborers. The third section provides that "the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, (the date of the treaty,) or *who shall have come into the same before the expiration of ninety days next after the passage of this act, and who shall produce the evidence hereinafter required,*" etc., (referring to the custom house certificates.) During the interval which elapsed between the date of the treaty and August 6, 1882, (90 days after the passage of the law,) large numbers of Chinese laborers came, without hinderance, into the United States, and many departed, of course without obtaining custom-house certificates, for none were by law required. On the return of these latter the question was presented whether the certificate required by the law of 1882 could be exacted of them as a condition of their right to re-enter the United States. We were of opinion that it *could not*, for reasons that appeared, and still appear, to us conclusive and unanswerable: *First*, having been here at the date of the treaty, the right of the laborers to "come and go of their own free will and accord" was guarantied to them by its second article in the plainest and most unequivocal terms. *Second*, this right was recognized by the law of 1882, for they were expressly excepted from the operation of the section of the act which suspended the coming of Chinese laborers.

It was contended by the district attorney that by the law *all* returning Chinese laborers were required to produce a certificate, and we

were asked so to construe it. In other words, we were asked to hold that congress in passing the law had, in effect, said to the Chinese laborers:

"True it is that you were here at the date of the treaty, or have come here within 90 days after the passage of this act, and had the right when you left the United States to go and come of your own free will and accord, but you shall be denied that right unless you have heretofore, and at the time of your departure, obtained a certificate, now for the first time required to be obtained by departing laborers; which at the time of your departure no law authorized any United States official to issue to you; which it was legally impossible for you to obtain; and which, if you had obtained it, would have been wholly invalid for want of authority on the part of the custom-house officers to issue it; and because it would not have been the certificate required by the law we are now passing."

Can it be contended that any court should so construe this law (if such construction could by possibility be avoided) as to impute to congress, when legislating "to execute certain treaty stipulations with China," and while affecting to acknowledge rights secured by the plain language of the treaty, the intention to attach, by retrospective and essentially *ex post facto* legislation, conditions precedent to the exercise of that right which it was impossible to perform, and to enact that the non-performance of those conditions should forfeit the right; and this construction we were asked to give to a law which discloses the most scrupulous solicitude on the part of congress to avoid even the appearance of retrospective legislation, for it provides that the sections prohibiting the coming to the United States of Chinese laborers, not only shall not apply to Chinese laborers in the United States at the date of the treaty, but also to those who might come into the United States before the expiration of 90 days next after the date of the passage of the law, thus protecting from its operation not merely Chinese laborers *in transitu*, but laborers who might leave China before the expiration of a period of time reasonably sufficient for notice of the law to reach that country.

It appeared to us very plain that, by adopting the construction contended for, we should, in effect, accuse congress of gross disingenuousness, or of utter disregard of a treaty stipulation, to the observance of which the national honor was pledged. The only clause in the act which in any degree favored the construction contended for, occurs in the third section, already cited. It will be observed that that section provides "that the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, etc., and who shall produce to the collector the evidence hereinafter in this act required," etc. The use of the copulative conjunction "and" seemed to favor the idea that the laborers excepted from the operation of the two preceding sections were those who not only were here at the date mentioned, but who should produce the evidence required. But the considerations I have advanced seemed too strong to be overcome by the existence of a single

word in the text of the law. We attributed its appearance to inadvertence or clerical error. The recent legislation of congress has shown our supposition to have been correct. In the corresponding section of the law of 1884 the word "and" is omitted, and the words "nor shall said sections apply to Chinese laborers who shall produce," etc., are inserted. The Chinese laborers whose coming to the United States is not suspended by the act are thus clearly divided into two classes: *First*, those who were here at the date of the treaty, or have come before August 6, 1882; *second*, those who, having departed after the passage of the law, shall produce the evidence in the act required. The construction we had given to the act of 1882 must have been known to congress, certainly to the members more especially interested in the bill. The amendment or correction referred to was accepted without objection by the chairman of the committee which reported the bill, and without opposition from any quarter. I cannot but regard this correction of the language of the act of 1882 as an unmistakable legislative affirmance of the correctness of the construction we had given it.

Upon these grounds the judges were unanimously of opinion that the return certificates could not be exacted as a condition precedent to their right of re-entering into the United States of those laborers who were here at the date of the treaty, and who had left the United States before the law of 1882 went into operation, and that the provisions of that law with regard to return certificates did not and were not intended to apply to such laborers.

The rulings of the treasury department on this point have been conflicting. On the twentieth day of July, 1882, the custom-house authorities were instructed that a laborer, who was in the United States at the time the treaty was ratified, but departed without a certificate of identification from the collector of customs, and prior to the time when that office was prepared to issue such certificates, has the right to return *only* on certificate of identity, required by the statute. This instruction is signed by Judge Folger, secretary of the treasury. Whether prepared by him or by a subordinate, we are not informed. The same question appears to have been again presented to the department, and on the twenty-sixth day of October, 1882, further instructions were forwarded to the custom-house authorities. In these instructions the following passage occurs:

"All laws must receive a reasonable construction, and the intent of the legislature in cases of doubtful construction is always to be regarded. It manifestly was not the intention of congress to take away from a Chinese laborer residing in this country at the date of the confirmation of the treaty his right to go and return at pleasure.

"Inasmuch as it is impossible for a Chinese laborer departing from this country before the passage of the act of 1882 to obtain the certificate required by that act, congress could not have intended to deprive him of his right to return for not doing what was impossible.

* * * * *

"It will be understood, of course, that the decision of this department is subject to be overruled by the courts."

It would not be easy to state more compactly the grounds upon which our ruling is based. This instruction is signed by "H. F. FRENCH, Acting Secretary of the Treasury." He makes no allusion to the previous instruction, signed by the secretary. If that instruction had been known to him, and supposed to express the deliberate opinion of the secretary, he would scarcely have overruled it, especially without referring to it. This instruction by the acting secretary, being the latest, is accepted by the custom-house as furnishing a rule for its guidance. The ruling of the department is thus seen to be in harmony with the decisions of the courts.

But the claim now set up by the present petitioner is based on wholly different grounds. He does not, nor can he, deny that the law was applicable to him, nor that he was bound to procure a certificate. He left the United States two months after its passage. He asks the court to excuse his non-compliance with the law in consideration of the equitable circumstances which he offers to prove. I am of opinion that the court has no such dispensing power. The terms of the act of 1884 expressly forbid the reception of any evidence of the right to re-enter other than the certificates required by the law. The policy and intent of congress are thus clearly indicated. No excuses for the failure to procure the required certificate in any case can be received. No equitable circumstances can be shown to explain the failure to obtain the certificate, for no evidence of them is "*permissible*." The peremptory language of the law of 1884 may not be applicable to a case arising under the law of 1882, but the policy and intention of congress, indicated by the former, may justly be received as a guide to the true construction of the latter.

The ruling in this case may seem harsh, as the petitioner may allege that his failure to obtain his certificate was in part caused by the fault of the custom-house officials. But he, on his own showing, was also in fault. He knew, or might have known, that an unusually large number of passengers were about to leave on the three steamers which sailed on the day he endeavored, as he says, to obtain his certificate. It was his duty to make his application seasonably, and in time to allow the customs authorities to discharge their duties under the act. He may, not unjustly, be visited with the consequences of his neglect. But even if the court were not, as I believe, without authority to dispense with the requirements of the act, the exercise of such authority would be highly inexpedient. Admitting that the facts, as offered to be proved in this case, are generally true, yet the only evidence that the petitioner was one of the crowd of 40 or 50 who were unable to gain admittance to the registration office is his own unsupported statement. If the production of the certificate can be dispensed with in his case, the same rule must be applied to every laborer who may choose to swear that he was one of the

crowd. And even after the 40 or 50 who are now said to have composed it are admitted, others might present themselves who would claim the same privilege, either by swearing that the crowd consisted of a much larger number of persons, or that the court had been imposed on by their predecessors, and that the later petitioners were the persons who really composed the crowd. Moreover, if the excuse now offered be accepted, I see not how any other excuse which the fertile ingenuity of these people could invent, or their unscrupulous mendacity permit them to swear to, could be rejected. They could claim that they were prevented by illness from applying for a certificate, or that they were waylaid and assaulted on their way to the custom-house, or that they arrived in the city barely in time to get on board the steamer, and so on indefinitely, through the endless gamut of deceptions which have in so many instances wearied and disgusted the court, but the falsehood of which the district attorney is, in general, from the nature of the case, without the means of exposing.

Where the petitioners have claimed the right to re-enter on the ground that they left the country before the passage of the law, proofs other than by parol of that fact, and that they were here at the date of the treaty, can readily be afforded. Profoundly impressed as I am with the unreliability of Chinese testimony in general, yet the nature of the proofs, always documentary, which I have exacted, leads me to believe that the frauds which have in this class of cases under the restriction act been committed, are insignificant in number. But if the door has now been thrown open to the admission of parol testimony, tending to show some plausible excuse for not having obtained the certificates required by the act, both the court and the law will be at the mercy of Chinese testimony which it would be impossible to morally accept as true, and equally impossible to contradict. I think, therefore, that even if I had the power to exercise any discretion on this subject it would be my duty to refuse to admit the testimony now offered. But believing, as I do, that it is inadmissible under the law, I have no authority to receive it.

The ruling here announced is not new. So long ago as November 14, 1883, *In re Pong Ah Chee*, 18 FED. REP. 527, it was held by this court that a laborer who was here at the date of the treaty, but who departed after the law of 1882 went into operation without having obtained a certificate, could not be permitted to land, notwithstanding that he offered to show that at the time of his departure he was ill and not expected to survive until his arrival in China, and for that reason neglected to obtain his certificate. The principle involved in that ruling is substantially the same as that announced in the present decision, though the circumstances alleged in excuse are entirely different. I think that no other ruling can be made without wholly sacrificing the law to Chinese mendacity. Nor is the rule adopted more harsh than that which prevails in many civilized countries where the passport

system exists. In none of them, it is believed, would any excuse for the non-production of the passport, such as has been offered in these cases, be received.

In re CHIN AH SOOEY.

(District Court, D. California. August 21, 1884.)

CHINESE IMMIGRATION—ACTS OF 1882 AND 1884—POWER OF COURT TO ORDER REMOVAL OF CHINAMAN FROM COUNTY.

Where a Chinese person has, on proceeding by *habeas corpus*, or by a justice, judge, or commissioner, been found to be unlawfully within the United States, and the vessel from which he was taken has sailed, the court may direct the marshal, to whose custody such person has been remanded, to cause him to be removed to the country whence he came.

Habeas Corpus.

In this case the petitioner, a Chinaman, had, by the judgment of the court in a proceeding of *habeas corpus*, been remanded to the custody from which he was taken. The marshal thereupon made return that the ship from on board which he was taken had sailed, and that it was therefore impossible to execute the order of the court. An order was thereupon entered committing the petitioner to the custody of the marshal to await the direction of the president for his removal, or the further order of the court. Under the act of 1884 the directions of the president are no longer required. The assistant United States attorney moved that an order or writ be directed to the marshal, commanding him to cause the petitioner to be removed to the country whence he came.

S. G. Hilborn, U. S. Atty., and Carroll Cook, Asst. U. S. Atty., for the United States.

A. P. Van Duzer, for petitioner.

HOFFMAN, J. Neither the act of 1882 nor the recent act of 1884 makes any specific provision for the disposition to be made of Chinese persons found on a proceeding by *habeas corpus*, or by "a justice, judge, or commissioner," to be unlawfully within the United States. That any human being claiming to be unlawfully restrained of his liberty has a right to demand a judicial investigation into the lawfulness of his imprisonment, is not questioned by any one who knows by what constitutional and legal methods the right of liberty is secured and enforced by at least all English-speaking peoples. In many of the states the refusal on the part of the court or judge to grant the writ of *habeas corpus*, on a proper showing, is punished as a misdemeanor. When, therefore, Chinese in large numbers arrived at this port, who were detained on board the ship by the master, at the instance of the customs-house authorities, their right to demand the judgment of the court whether they were lawfully restrained of their liberty could not

be gainsaid. Writs of *habeas corpus* were accordingly issued in hundreds of instances. The ordinary course in such cases is either to discharge the petitioner, or to remand him to the custody from which he was taken, when such custody is found to be lawful. It soon became apparent that the latter course, owing to the number of cases, was impracticable; for the ship would, in the ordinary course of her trade, have departed long before the petitions could be heard. The suggestion by the district attorney that "the ship should be detained," was, of course, rejected: *First*, because the restriction act conferred no such power on the court; and, *secondly*, because it could not have been contemplated by congress that the traffic of a great line of steamers should be interrupted, the intercourse between this city and the ports of China and Japan be suspended, and the mail service be obstructed, because it was alleged that some of the passengers on her inward-bound voyage were not entitled to land,—passengers who had been admitted on board on presentation of certificates which the law declared to be *prima facie* evidence of their right to enter the United States.

When, therefore, it appeared by the return of the marshal that he was unable to execute the order to remand the petitioner, the embarrassing question presented itself, what was to be done with him? The twelfth section of the act provided that "any Chinese person found unlawfully within the United States shall be caused to be removed to the country from whence he came, *by direction of the president of the United States*, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain within the United States." It will be observed that this section does not confer, in express terms, any power on the justice, judge, or commissioner to issue any warrant or other order for the purpose of causing the person accused of being unlawfully within the United States to be brought before him. We thought, however, that the power might be implied from the provisions of the act, and from the general powers conferred on those officers to inquire into alleged offenses against the laws of the United States. A more serious difficulty arose from the entire omission in the section of any clause conferring power on the justice, judge, or commissioner to make any order for the removal of the offender to the country whence he came, or indicating to whom such order should be directed, or by whom executed. Here, again, we were obliged, in order thus to save the law from total failure, to hold that the justice, judge, or commissioner might, on finding the person brought before him "not to be lawfully within the United States," make an order committing him to the custody of the marshal, to await "the direction" of the president. We were at first disposed to think that this proceeding before a justice, judge, or commissioner was indispensable. Had we so held, a double investigation would in all cases have been necessary; it might be, before the

same judge who had heard the case on the return of the writ of *habeas corpus*. We therefore held, though not without some doubt, that the finding of the court in the *habeas corpus* proceeding might be taken as, or as the equivalent of, a finding by a justice, judge, or commissioner, mentioned in the twelfth section of the act.

In the recent amended act of 1884, the words "by direction of the president of the United States" are omitted. But the act, like the law of 1882, fails to confer on any tribunal or officer authority to cause the person unlawfully here to be removed to the country whence he came. Neither does it indicate by whom the removal is to be effected. As the amended act withdrew from the president the authority to direct the removal, the order of commitment could no longer command the marshal to hold the prisoner to await his direction. To keep the "Chinese person" in prison or on bail for an indefinite period was out of the question. To discharge him would be to render the act wholly abortive, except as to those persons whose cases might be heard in time to remand them to the ship on which they came. Under these circumstances, and to prevent the almost entire collapse of the law, we, with some hesitation, held that the court might issue an order to the marshal commanding him in effect to cause the person found to be unlawfully here to be removed to the country whence he came. We are aware that the act does not in terms confer on us any authority to pass and cause to be executed a sentence of deportation on Chinese persons. But, unless the act be construed as impliedly giving us that authority, it would prove utterly abortive as a means of attaining the object which congress had in view. The construction we have given may seem to many, perhaps not unjustly, latitudinarian, and savoring of judicial legislation. It has appeared to us unavoidable, *ut res magis valeat quam pereat*.

The foregoing will convey an idea of the embarrassing nature of some of the numerous questions which arise under the restriction acts. It also serves to show what has been the justice of the reproaches so freely cast upon the courts, that they have been, from some inconceivable motive, engaged in a persistent effort to defeat on technical grounds the operations of the law.

The motion of the district attorney is granted.

Ex parte DAVIS.¹

(Circuit Court, D. Kentucky. August 8, 1884.)

1. CONSTITUTIONAL LAW — DISCRIMINATION — EFFECT OF UNCONSTITUTIONAL AMENDMENT TO VALID ACT.

The validity of a constitutional act is not affected by an amendment which is unconstitutional, because it discriminates between citizens of different states, and which does not in terms repeal the original act. The amendment is void, and does not by implication repeal the original act.

2. SAME—HABEAS CORPUS.

An offender, convicted under the original act, will not be discharged on writ of *habeas corpus*.

3. SAME—CONSTRUCTION.

Doubts are to be solved in favor of the constitutionality of legislative enactments.

On Writ of *Habeas Corpus*.

Quigley & Quigley, for petitioner.

Russell & Helm, for respondent.

BARR, J. It appears from the petition of the prisoner, and the return of the jailer in response to the *habeas corpus*, that Davis has been indicted for selling goods, wares, and merchandise as a peddler without a license, and that he has been convicted and fined \$100, which he has failed to pay and is now imprisoned under the law. This court cannot discharge the prisoner unless the law under which he has been indicted and convicted is void because it violates the constitution of the United States. If, however, this law is clearly a violation of the federal constitution, it is the duty of this court to discharge him. Rev. St. § 753; *Ex parte McCready*, 1 Hughes, 598; *In re Brosnahan*, 18 FED. REP. 62. The constitution of the United States is the supreme law and must be obeyed. The question of whether congress or the legislature of a state has violated its provisions, is always one of delicacy, and one in which the courts will solve doubts in favor of the constitutionality of legislative enactment. The petitioner, Davis, was indicted and convicted under the provisions of the eighty-fourth chapter of the General Statutes. The first section of this chapter provides that "all itinerant persons vending goods, wares, merchandise, * * * or any other thing, * * * shall be deemed a peddler;" and subsequent sections required all peddlers to obtain a license to sell, and provided that if any person violate the provisions of the chapter he shall be fined \$100, and in default of payment of the fine shall be imprisoned not less than 50 nor more than 100 days in the jail of the county where the offense was committed. The General Statutes were passed in April, 1873, and went into effect December 1, 1873. The legislature, at its next session,

¹Reported by George Du Relle, Asst. U. S. Atty.

passed an act, February 21, 1874, entitled "An act to amend chapter 84 of General Statutes, title, 'Peddlers,'" which is as follows:

"(1) *Be it enacted by the general assembly of the commonwealth of Kentucky*, that chapter eighty-four of the General Statutes, title, 'Peddlers,' be and the same is hereby so amended that itinerant persons who are citizens of this state, and who vend exclusively goods, wares, and merchandise, which are the growth, product, or manufacture of this state, shall not be deemed peddlers, nor required to take out license under the provisions of said chapter."

This amendment made a discrimination between citizens of this state and citizens of other states, and between "goods, wares, and merchandise which are the growth, product, and manufacture" of this state, and those which are the product or manufacture of other states. This discrimination is clearly unconstitutional, (*Welton v. Missouri*, 91 U. S. 275; *Guy v. Baltimore*, 100 U. S. 434,) and, being unconstitutional, the amendment is null and void. But this should not release the petitioner, as he was prosecuted under the original act, unless the amendment has made the original act void. The original act made no discrimination, and the question is whether the passage of this amendment, which made a discrimination, destroys the whole act. The rule is to sustain as much of a legislative enactment as is constitutional, if it can be done with a proper regard to the legislative will. This amendment does not in terms repeal the original law, and if that law is repealed in part, it is because the amendment is inconsistent with so much of the original act. The amendment, being unconstitutional, is itself void, and hence did not repeal any part of the original act. The original act and the amendment of 1874 were passed by different legislatures, and it therefore cannot be said that the original act would not have been passed except for the amendment. The chapter (84) is a perfect law within itself, and we see no good reason why it should not stand as if the amendment had never been passed.

If we are correct in our view, then the amendment of 1874 has no legal effect, and all itinerants—residents and non-residents—selling goods, wares, and merchandise, wherever manufactured, are peddlers, and liable to be prosecuted if they sell without license. This view would not be permissible if the state courts have held this amendment to be a valid amendment, and as such engrafted upon the original act; but I do not understand that they have so decided. The manuscript opinion of the court of appeals, (*Com. v. Cecil*, decided March 1882,) decides no more than that this constitutional question did not arise in that case; and the same court, in *Daniel v. Richmond*, 78 Ky. 543, distinctly decides that a discrimination like the one made by this amendment is unconstitutional and void. This court cannot assume that the court of appeals will declare this amendment constitutional; and being of the opinion that the amendment is unconstitutional, should assume that the judicial department of the

state will regard it as a nullity, and consider the original law standing without amendment.

The petitioner should therefore be surrendered to the custody of the jailer of McCracken county; and it is so ordered.

In re STEWART, Bankrupt.

(District Court, D. New Jersey. July 24, 1884.)

1. **BANKRUPTCY—DISCHARGE—GAMING—REV. ST. § 5110.**

The discharge of a bankrupt is not a matter of right, but of favor, and the law may prescribe the terms on which he may be released from the payment of his debts; and every person who subjects his property to the hazard of loss at the gaming table, and loses what in fact belongs to his creditors, is not within the class entitled to the benefit of the statute.

2. **SAME—LOSS BY GAMING—WINNINGS—EVIDENCE.**

The law does not charge the court with the duty of ascertaining whether or not the bankrupt's losses by gaming exceeded his winnings, and if it is shown by the evidence that he actually lost money by gaming the court must refuse him a discharge.

In Bankruptcy. Specification against discharge.

Henry S. Harris, for bankrupt.

James Buchanan, for petitioning creditors.

NIXON, J. The sole allegation in the specifications filed against the discharge of the bankrupt is that he lost some part of his property in gaming. This is one of the grounds set forth in section 5110 of the Revised Statutes, which, when it is proved, compels the court to refuse the discharge. It is founded on the idea that the order of discharge is not a matter of right, but of favor; that the law may prescribe the terms on which the debtor may be released from the payment of his debts; and that every person who subjects his property to the hazard of loss at the gaming table, and loses what in fact belongs to his creditors, is not within the class entitled to the benefit of the act. Such a provision occurred in all the earlier English bankruptcy laws, but has not been included in the later acts consolidating the law of bankruptcy; nor is it found in the United States bankrupt act of 1841. What is gaming? And has the allegation been proved in the present case? The word has a wide signification. It includes wagers, bets, or stakes depending upon chance. Webster says it is the use of cards, dice, billiards, or other instruments according to certain rules, with a view to win money or other thing waged upon the issue of the contest. The specifications charge numerous games of chance, with cards, for money at various places, but especially at the village of Washington, New Jersey, the residence of the bankrupt. The proofs are clear as to the fact of the gambling, but not very definite as to the losses which the bankrupt sustained.

These were so small that the counsel for the bankrupt, on the argument, suggested that the court ought to apply the maxim "*de minimis non curat lex*," and dismiss the case. But I am not clear that I ought to do this. No such question could arise under the provisions of the English bankruptcy act, as they always specified the amount that must be lost to authorize the court to withhold the certificate. But our act is different. The discharge must be refused, or, if granted, must be invalidated on proof that any part of his property has been lost in gaming. The counsel for the bankrupt also urged that if the bankrupt did not appear to be a loser on summing up the aggregate result of his losses and gains, he did not come within the act. The law does not charge the court with the duty of going into any such calculations. It is not to add up in one column the losses and in another the winnings, and then hold that the law has been violated or not, according to the amounts of the respective columns. Such an attempt was made in *Ex parte Newman*, 2 Glyn & J. 329, but was not sustained by Vice-Chancellor LEACH. In that case the bankrupt applied for the certificate of discharge, and the application was opposed on the ground that he had on a certain day before the bankruptcy lost £40 by a wager at a main of cocks. The statute of 6 Geo. IV. c. 16, § 130, enacted "that no bankrupt shall be entitled to his certificate, etc., and that any such certificate, if obtained, shall be void, if such bankrupt shall have lost by any sort of gaming or wagering in one day twenty pounds," etc. The bankrupt admitted the loss charged, but offered to prove that on the same day he won £45 on another wager on the same cocks, and that he was winner in the sum of £5. The vice-chancellor held that it was not a question of loss or gain, and that the bankrupt had lost by gambling within the meaning of the act. He would not allow any offset of the losses by the winnings, and refused the certificate.

As the proofs here show losses, I must hold that the case comes within the law, and must refuse the discharge.

SCHNEIDER v. POUNTNEY.

(Circuit Court, D. New Jersey. August 30, 1884.)

PATENTS FOR INVENTION—REISSUE No. 10,087—SHADE-HOLDER FOR LAMP—INFRINGEMENT OF COMBINATION—USE OF PART ONLY—INTENTION OF INFRINGER.

Reissued patent No. 10,087, granted April 11, 1882, to Bennett B. Schneider, as assignee of Carl Votti, the original inventor of an "improvement in shade-holders for lamps," in which the shade-holder becomes the base of the chimney, and the shade its top, retaining all their own functions in the lamp, and dispensing with a separate chimney, is a valid patent, and is infringed by the manufacture and sale of the shade-holder without the other part of the invention, in combination with which it is useful, with intent that it shall be used by the purchaser in combination with a chimney to perform the function for which it was invented.

On Bill, etc.

Livingston Gifford, (with whom was *A. Q. Keasbey*,) for complainant.

Wetmore & Jenner, for defendant.

NIXON, J. On the third of October, 1876, the United States patent-office issued to one Carl Votti, of Newark, New Jersey, letters patent No. 182,973, for "improvements in shade-holders for lamps." The patentee stated in his specifications that his invention consisted in the combination of a shade-holder, made of glass or other transparent material, with the cone of the burner of a lamp,—the two being so constructed as to provide a free access of air outside and inside the cone, in order to produce a brilliant light without the use of a chimney. After a succinct description of the drawings, he states his claim as follows:

"The combination of the shade, C, shade-holder, B, constructed of transparent material, and provided with a downwardly extending socket, c, and dish-shaped flange, d, with the cone, b, having a flange, A, provided with apertures for the admission of air to the outside and inside of the cone; the whole arranged to operate without a chimney, substantially as set forth."

The attention of the complainants, who had been engaged in the lamp and glass business for upwards of 30 years, was called to the invention in the summer or autumn of 1876. He states that one of his customers brought the illuminator, shade and burner to his notice, and from the moment he saw it he considered it a very valuable improvement, and determined to get the possession and control of the patent. He had an interview with the inventor, purchased the sole right to use the invention, and began at once to have a number of moulds made for the manufacture of glass shade-holders, to be used without a chimney, in combination with lamp burners and shades. The success of the sales of the new product was remarkable. From October 9, 1876, to January 9, 1877, the complainant sold 57,228. During the first year (1877) the sales reached 361,416, and there was a gradual increase from year to year until 1882, when the yearly sales had run up to 602,556.

A few months after the original patent was granted, it was surrendered and a reissue obtained, numbered 7,511, and dated February 13, 1877. It stated that the invention consisted in a transparent shade-holder, or holder of a material allowing the passage of light, and shade or globe, so arranged that an ordinary burner could be used without a chimney. The inventor then made three specific claims, as follows: (1) In a lamp having a burner, the combination of a shade-holder made of a material that will admit of the passage of light, and a shade or globe arranged and constructed substantially as described, whereby the burner performs the required functions without the use of a chimney, as set forth; (2) the shade-holder, B, constructed of material that will admit of the passage of light, and provided with a downwardly extended socket, c, and dish-shaped

flange, *d*, with rim, *E*, in combination with a globe or shade, *C*, and burner, *A*, of a lamp, as and for the purposes herein set forth; (3) the combination in a lamp of the burner, *A*, having perforated flange, *a*, and cone, *b*, the shade-holder, *B*, with central socket, *c*, and a shade or globe, *C*, substantially as and for the purposes herein set forth.

The question of the validity of this reissue was first before Judge BENEDICT in the case of *Schneider v. Thill*, 5 Ban. & A. 565, and afterwards before Judge BLATCHFORD in *Schneider v. Lovell*, 10 FED. REP. 666. Both of these learned judges held the reissue to be invalid, and for substantially the same reason, to-wit, that the specification did not contain the full, clear, and exact description of the invention that the law requires. After these decisions a second reissue was applied for, and secured April 11, 1882, and numbered 10,087. The inventor adds to the drawings of the original patent and the first reissue the drawing of a model which he numbers 3, and which he says corresponds in size, as well as in form and proportions, with the model that was filed with his application for his original letters patent, and further states that the form and proportions of said shade-holder are well adapted for use in carrying out the invention. In this reissue he claims as new: (1) In a lamp, the combination of a kerosene burner with a transparent shade-holder and a shade, the shade-holder being adapted to rest upon the burner in the place adapted for the ordinary chimney, the shade resting on said shade-holder, and being formed so as to converge from its base towards its top, and the shade and shade-holder together constituting the draught-inducing device for the burner, substantially as set forth. (2) The shade-holder, *B*, constructed of a material that will admit of the passage of light, and provided with a downwardly extending socket, *c*, and dish-shaped flange, *d*, with rim, *e*, in combination with a shade, *C*, converging from base to top, and the kerosene burner, *A*, of a lamp, as and for the purpose set forth. (3) The combination in a lamp of the burner, *A*, having perforated flange, *a*, and cone, *b*, the shade-holder, *B*, and socket, *c*, and a shade converging from base to top, substantially as and for the purpose herein set forth. (4) The combination of the shade, *C*, shade-holder, *B*, constructed of transparent material, and provided with a downwardly extended socket, *c*, and dish-shaped flange, *d*, with the cone, *b*, having a flange, *a*, provided with apertures for the admission of air to the outside and inside of the cone, the whole arranged to operate without a chimney, substantially as specified. Each of these claims is for a combination consisting of various elements, all of which are old, except the form and construction of the shade-holder, which the inventor claims to be new. He further claims that by their combination he has obtained a new mode of operation, or a new and useful result, to-wit, a lamp without a chimney, with a sufficient draught to produce a good light.

The present suit is brought on this reissue, and the first question
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arising is whether the alleged defects of the original patent and first reissue have been cured in the second. The counsel for the complainants claim that they have been, and base their judgment mainly upon two facts: (1) That the testimony in this suit clearly reveals the sufficiency of the specifications of the patent to all persons skilled in the art; and (2) that the last reissue has supplied the defects which the learned Judges BENEDICT and BLATCHFORD found in the first reissue. The evidence, which was wanting in the cases before these judges, designates the shade exhibited in the drawings as a student lamp shade or its equivalent, a shade well known in the art as being large at the bottom, thereby admitting of the reflection of the light downward and outward, and contracted at the top, thereby inducing a draught. The form and proportion of such a shade are well known, and its characteristics are thus described in the last reissue:

"It will be observed that the shade, C, which is to fit on the shade-holder, converges from its base towards its top, so as to be large at the base and considerably contracted at the top, whereby the upward-tending rays from the flame may be mostly intercepted by the shade and be reflected downward and outward around the fount of the lamp, while the equilibrium of the shade upon the shade-holder is such that no means of attachment, other than the flange and rim of the shade-holder, is needed to prevent its falling off in ordinary use."

In answer to Judge BLATCHFORD's criticisms of the first reissue, that the proper proportions of the shade-holder were not stated or shown in the drawings, the complainant caused a drawing to be made of the original model on file in the patent-office since the first patent was applied for, and annexed a copy to the last reissue, and then states that the proportions and form there shown are the best for successfully carrying out the invention. I am of the opinion that in the light which he has thrown upon the subject-matter of the patent by the evidence introduced, and in the fuller specifications of the last reissue, he has fairly succeeded in bringing out the true character of the invention, to-wit, a useful device by which the shade-holder becomes the base of the chimney and the shade its top, retaining all their own functions in the lamp, and dispensing with a separate chimney.

The remaining question is one of more difficulty: Does the testimony show that the defendant has infringed any of the claims of the reissue? It is the general law, in regard to combination claims, that all the elements that make up the combination or their equivalents must be used to constitute an infringement. The defendant is a glass manufacturer, and the charge against him is that he has manufactured and sold the transparent glass shade-holder, which is one of the constituents of the complainant's combination, and the only one that is claimed to be novel and that characterizes Votti's invention. As there is nothing in the reissue which claims this shade-holder, except in combination with the other elements, it is

clear that the making and selling of it, standing alone, is not an infringement of any of the claims. See *Saxe v. Hammond*, 1 Ban. & A. 632.

But the complainant insists that where there are several tort-feasors, each contributing elements which are intended to be used in combination, they are all liable as infringers, and that a suit may be maintained against all, or each one separately. The allegations of the bill of complaint, as to the infringement of the defendant, are (1) that certain shade-holders, made and sold by the defendant, are only used in Votti's combination, and are not applicable to or useful for any other purpose; and (2) that the defendant knew this fact, and made and sold said shade-holders with the knowledge that they could be used by the purchaser thereof in constructing said patented combination in infringement of said patent, and that he made and sold them for that purpose.

In regard to the first allegation, the complainant's expert, Brevoort, and his agent in patent matters, Hanford, both explicitly state that they know of no other uses to which the shade-holder, made by the defendant and complained of by the complainant, can be applied, except in combination with the other devices of the Votti patent, and that they never heard of their being put to any other use. This testimony stands uncontradicted except by the suggestion of defendant's counsel of possible use to which such shade-holders might be applied. I recollect nothing from the defendant himself or from any of his witnesses which shows, in fact, any other application.

As to the second allegation, referring to the intent of the defendant in his manufacture of the shade-holder, I think it is fairly to be inferred, (1) from the conversation of the defendant with Hanford; (2) from his attempts to get from the complainant an exclusive right to manufacture the shade-holders; (3) from the tenor of the circulars that he prepared and sent out; and (4) from his absolute silence when upon the witness stand, in regard to any other use for which he manufactured them, that his intent in making and selling them was to have them used in combination with the other devices of the complainant's patent.

The law in such cases has been quite definitely settled. The first case to which I would allude is the leading one of *Wallace v. Holmes*, 5 Fisher, 37. The patent there was also for an improved lamp, consisting of the combination of several parts. The alleged infringement was for the manufacturing and selling one of the elements of the combination, to-wit, the burner. It was used in combination with a chimney, and the purchasers of the burners were expected to go into the market and procure the chimneys from other manufacturers. Judge WOODRUFF held that the defendants could not protect themselves by invoking the well-settled rule that where a patent is for a combination merely, it is not infringed by one who uses one or more of the parts, but not all, to produce the same results, either by

themselves or by the aid of other devices; but that if one party consented to make the burner, and another party the chimney, and each was sold to be used with the other, the parties must be deemed to be joint infringers of the patent, and that each was liable for all the damages. The learned judge drew the inference of an actual concert between the parties from the nature of the case, and the distinct efforts of the defendants to bring the burner in question into use, which could only be done by adding the chimney. He admitted that he found no proof that the defendants had made an actual pre-arrangement with any particular person to supply the chimney to be added to the burner; "but," says he, "every sale they make is a proposal to the purchaser to do this, and his purchase is a consent with the defendants that he will do it, or cause it to be done. The defendants are, therefore, active parties to the whole infringement, consenting and acting to that end, manufacturing and selling for that purpose."

The principle of the above case, after careful consideration, was indorsed by this court in *Turrell v. Spaeth*, 8 O. G. 986; by Judge SHEPLEY in *Saxe v. Hammond*, 1 Ban. & A. 652; by Judge LOWELL in *Bowker v. Dows*, 3 Ban. & A. 518; and again by the same learned judge in *Richardson v. Noyes*, 10 O. G. 507.

Let a decree be entered for the complainant, with costs.

HAVEMEYER v. RANDALL.

(Circuit Court, D. New Jersey. July 31, 1884.)

1. PATENT—TOPHAM'S PATENT FOR "IMPROVEMENTS IN SPITTOONS."

The invention claimed by Topham in his second claim of reissued letters patent (No. 5,514) is void for want of novelty.

2. SAME—VOID EXPANDED CLAIM—EFFECT AS TO OTHER CLAIMS.

Although a reissue may be void as to new or expanded claims, it may still be held good for claims that are not expanded, or which do not show a different invention from the original patent.

In Equity.

Wetmore, Jenner & Thompson, for complainant.

A. B. Cruikshank, (with whom was *F. P. Fitch*), for defendants.

NIXON, J. This bill is filed for the alleged infringement of the second claim of Topham's reissued letters patent No. 5,514, and dated July 29, 1873, for "improvement in spittoons." The claim is as follows:

"(2) The arrangement of the weight between the two layers or thicknesses of material of which the bottom of the spittoon or similar vessel is composed, substantially as and for the purposes specified."

Three defenses are set up: (1) The invalidity of the reissue, as for a different invention from the original; (2) the want of novelty of the invention, in view of the prior state of the art; (3) non-infringement.

1. The first cannot be maintained. The objection to the reissue is that the first claim thereof is an expansion of the first claim of the original patent, which applied the invention only to spittoons, pails, and vessels made of paper; whereas, the reissue is designed to make it applicable to all spittoons, pails, or vessels, liable to be overturned, without regard to the material of which they are composed. As the present suit is not upon the first claim, it is unnecessary to express any opinion concerning the correctness of such an objection. The second claim of the reissue, for the infringement of which damages are demanded, is the same as the second claim of the original, and it is now well settled that, although a reissue may be void as to new or expanded claims, it may still be held good for claims that are not expanded, or which do not show a different invention from the original patent.

2. The second alleges a want of novelty. Waiving any expression of opinion in regard to the several patents which the defendant put in evidence to show anticipation of Topham's second claim, I cannot resist the conviction that his alleged invention was in public use in Chicago before the date of the issue of his patent, to-wit, August 2, 1870, which, in the absence of all proof to the contrary, must be regarded, for the purposes of this case, as the date of his invention.

Six witnesses have been called—three by the complainant and three by the defendant—in regard to the manufacture and sale of cuspidors by the firm of Crerar, Adams & Co., carrying on business at Nos. 11 and 13 Wells street, Chicago, during the years 1868, 1869, and 1870. They all agree in the statement that during these years large quantities of cuspidors with weighted bottoms were sold to railroads and hotels, and that they were generally loaded with lead, or mixtures of scrap metal melted together. But Sararan Muller, who packed all the goods manufactured by the firm, and Joseph Kruselin, one of the workmen, testify that at the beginning and during the year 1868 a number of spittoons or cuspidors were manufactured, loaded with sand in the bottom, and that when sand was used it was secured and held in place by a tin plate, which was soldered above and on the top of the sand, and which formed the inside bottom of the vessel. One of the members of the firm, Mr. McGregor Adams, confirmed their testimony to the extent of asserting that, while he does not remember seeing the sand used, he has a positive recollection that the workmen told him, during the year, that they were making cuspidors and loading their bottoms with sand, secured by a metal plate over the sand. Muller and Kruselin enter into such particulars in regard to the sand being brought from the lake to the manufactory in barrels, and its frequent use by them in the manu-

facture, that their evidence must be accepted as true. The fact is uncontradicted, except by the negative statement of the three witnesses summoned by the defendant, who are able only to say that they have no recollection that sand was ever used by the firm in weighting the bottom of spittoons or cuspidors.

The invention claimed by Topham in his second claim is so accurately described by these manufactures of the Chicago firm, anticipating the date of his patent, that I must hold the claim to be void for want of novelty, and dismiss the bill of complaint, with costs.

HAVEMEYER v. BONNELL and others.

(Circuit Court, D. New Jersey. July 31, 1884.)

PATENT—BOTTOMS OF CUSPIDORS—DISMISSAL OF BILL.

Law announced in decision in case of *Havemeyer v. Randall*, ante, 404, applied to this case.

In Equity.

NIXON, J. For the reasons assigned in the case of *The Same Complainant v. Randall*, ante, 404, in which the same questions are involved, the above bill of complaint must be dismissed, with costs; and it is ordered accordingly.

WORDEN and another v. SEARLS.

(Circuit Court, D. New Jersey. July 22, 1884.)

1. PATENT LAW—JUDGMENT IN TRIAL OF SAME ISSUES BEFORE ANOTHER COURT.
In hearing a case formerly tried before another court, no new question being suggested or newly-discovered evidence adduced, the judgment of the former court should be assumed to have been correct.
2. SAME—PATENT WHIP-HOLDERS—INVALID CLAIM—COSTS—REV. ST. § 4922.
The invalidity of a new claim in a reissue does not render a patent void or impair the validity of the first claim, and suits may be maintained on the parts which the patentee is entitled to hold, although if such suits are commenced before a disclaimer is entered no costs can be recovered.

In Equity.

Sprague & Hunt, for complainants.

T. P. Fitch, for defendant.

NIXON, J. This is a suit in equity, brought for the infringement of the first, second, and third claims of certain reissued letters patent, dated February 18, 1879, and numbered 8,581, for "improve-

ment in whip-holders." The original letters patent, No. 70,075, were issued October 22, 1867, with a single claim, as follows:

"The shape and construction of the whip-holder, and the connection of the two sectional halves by hinges or joints, in such a manner as to hold the whip, when inserted, closely and firmly, by clasping the same at the top and bottom of the holder at the same time, the holder being formed of metal, cast or pressed into proper shape, substantially as and for the purpose set forth and described."

In the reissue four claims are substituted for the one claim of the original, as follows:

"(1) A whip-holder consisting of the parts, A, B, of double conical shape, and connected together at the bilge by a pivotal joint, substantially as described. (2) A whip-holder divided throughout its length into two parts hinged together, so that the holder will disclose a large opening for the reception of the whip, and will be closed at its top around the whip when the same is inserted into the holder, substantially as set forth. (3) A whip-holder composed of two parts hinged together, with the inner edges of each part cut away from the point of hinging to the ends, to allow the parts to work upon the joints, without overlapping each other, substantially as described. (4) A whip-holder composed of two parts of double conical shape, hinged together as described, and wherein one of the halves of the holder is provided with loops or fastenings, by means of which the holder is attached to a carriage seat or dash-board, substantially as specified."

In the case of *Worden v. Fisher*, pending in the Sixth circuit, and reported in 11 FED. REP. 505, his honor, Judge BROWN, seems to have carefully considered the question of the validity of this reissue, and he came to the conclusion (1) that the first, second, and third claims were valid,—regarding them as not expanding the claim of the original patent, but only making it more definite and particular; and (2) that the fourth claim was void because it embraced loops or fastenings, by means of which the holder was attached to the carriage or dasher, the same being a mechanical contrivance that appeared nowhere in the original patent.

The present action is brought against the person who was the manufacturer of the whip-sockets which, in the above case, were adjudged to infringe the reissued letters patent of the complainants. We have the same issues here which were passed upon by the circuit court there. No new question has been suggested, or newly-discovered evidence adduced, tending to change or modify the adjudication in that case. Under these circumstances I am not willing to sit in review of the decision of the learned judge who determined the case, but feel myself bound to assume that he was correct in finding the reissue valid as to the first three claims, and that the whip-sockets manufactured by the defendant infringe the complainant's patent.

But another and more difficult question has been brought to my attention. The decree in *Worden v. Fisher*, *supra*, was entered February 7, 1882, in which the court decided against the validity of the fourth claim. This suit was commenced about a month afterwards.

in March of the same year. When the cause came on for final hearing, the counsel for the defendants moved to dismiss it, on the ground that the complainant had been guilty of unreasonable delay in entering a disclaimer to the fourth claim, which had been adjudicated void. The motion was based on section 4922 of the Revised Statutes, which provides that whenever, through inadvertence, accident, or mistake, and without any willful default, or intent to defraud the public, a patentee has, in his specification, claimed to be the original and first inventor of any material or substantial part of the thing patented, of which he was not the original and first inventor, such patentee may maintain a suit at law or in equity for the infringement of any part thereof, which was *bona fide* his own, if it is a material part of the thing patented, and distinguishable from the parts claimed without right. But in every such case no costs shall be recovered unless the proper disclaimer has been entered in the patent-office before the commencement of the suit; and no patentee shall be entitled to the benefits of the section if he has unreasonably neglected or delayed to enter a disclaimer. In answer to such a motion, it might, perhaps, be sufficient to say, as was said by Justices NELSON and HALL in *Burden v. Corning*, 2 Fisher, 498, that the defense of unreasonable neglect or delay in filing a disclaimer must be set up in the answer before it can be considered by the court. But if that be waived as technical, the statute certainly requires that the part of the thing patented which is claimed without right, must be a material and substantial part of the invention, in order to render a disclaimer necessary. It was so held in *Hall v. Wiles*, 2 Blatchf. C. C. 194, and the decision has been since approved and followed.

The rejected claim in the reissue does not embrace any material or substantial part of the invention secured by the original patent. It has been declared void because it was not in the original specification and claim. It refers mainly to the method of attaching or fastening the whip-socket to the carriage or dash-board, and is no part of the socket itself, which embodies the invention patented. No complaint is made as to its infringement. It was not included in the pending suit, and hence the defendants have not been prejudiced in the defenses set up in their answer for want of a disclaimer.

The case of *Gage v. Herring*, 107 U. S. 646, S. C. 2 Sup. Ct. Rep. 819, is an authority for holding that the invalidity of a new claim in a reissue does not render the patent void or impair the validity of the first claims, and that suits may be maintained on the parts which the patentee is entitled to hold, although if such suits are commenced before a disclaimer is entered no costs can be recovered.

The complainants are entitled to a decree, without costs, and it is ordered accordingly.

THE KATIE COLLINS.

(District Court, D. Delaware. July 29, 1884.)

1. SALVAGE—PUBLIC POLICY.

Salvage exceeds a fair remuneration for work and labor, the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services.

2. SAME—WANT OF SKILL OR ENERGY ON PART OF SALVOR.

But salvage may be reduced by want of skill or energy displayed by the salvors, or even forfeited by their misconduct or gross negligence.

3. SAME—STRANDED VESSEL.

Where salvors, having the management of the business, fail to get a stranded vessel afloat at the first high water at which she might have been floated, had they employed the proper means, they must be considered as having failed in point of skill and energy, and must suffer the just and legal consequences of such failure, notwithstanding they may have saved the vessel and cargo.

4. SAME—MISTAKE OR ACCIDENT.

Where, by mistake or accident, salvors, in attempting to haul off a stranded vessel, misplace a beach-anchor and thereby unnecessarily prolong the work, they will not be entitled to a compensation much, if any, in excess of their actual expenses.

In Admiralty.

Henry R. Edmunds and Theodore M. Etting, for libelants.

Henry Flanders and Curtis Tilton, for claimants.

WALES, J. The schooner *Katie Collins*, laden with lumber and bound from Jacksonville, Florida, to Perth Amboy, New Jersey, went ashore on the Virginia coast, about seven miles south of Chincoteague island, at midnight on the thirtieth of October, 1881. The disaster was attributed to mistaking the Chincoteague light, on her star-board bow, for the head-light on a steam-ship. The next day her captain sent a message to the nearest telegraph station, to be forwarded to the libelants at Norfolk, Virginia, requesting them to come to his assistance at once. This message was received by the libelants at 12 o'clock m. on the first of November, and they immediately made preparations to go to the relief of the stranded vessel, distant about 80 miles from Norfolk and 50 miles from Cape Charles. The wrecking schooner *B. & J. Baker*, of 100 tons burden, owned by the libelants, supplied with a beach-anchor, hoisting engine, steam-pump, and other necessary appliances used in the wrecking business, with a crew of eight men all told, left Norfolk the same night, in tow of the tug *Nettie*, for Hampton roads. On the morning of November 2d, the *Baker* was taken in tow by the *Rattler*, a larger tug, which had come from Baltimore by order of the libelants, and was brought round to the vicinity of the *Collins*, coming to an anchor a few miles to the southward, for fear they might pass her in the dark. Early on Thursday, November 3d, Nelson, the wreck-master in charge of the expedition, anchored directly off the *Collins*, at the distance of about 200 fathoms. His first step was to take the soundings; rowing

as nearly in a straight line from the Baker to the Collins as he could. He found the depth of water at the Baker three fathoms, running in at that depth for about 100 yards; then it rapidly shoaled, until in two casts he had less than two fathoms, next nine feet, and at the stern of the Collins between six and seven feet, with the breakers close to her bow. The Collins drew $11\frac{1}{2}$ feet aft and $10\frac{1}{2}$ forward, and was heading nearly north-west. The coast line here runs south-south-west. From 200 to 400 yards to the north of and parallel with the Collins was a reef formed by the Assawaman inlet, and extending some considerable distance seaward. After placing the hoisting engine on the Collins, the wreck-master, with the aid of the crews of the Baker and the Rattler, attached the cable to the wreck, preparatory to putting the beach-anchor in position. The tug then took the Baker in tow, under the command of Nelson, and, to use his own words, "When I got near the direction where I wanted to place the beach-anchor, his tow-line parted and I let go the beach-anchor, which was then as near a right angle from the line of breakers where the schooner laid as I could judge. Hove taut, and the vessel moved some that night astern at high water." The whole of this day had been spent as thus described, and on the supposition that there would be no further use for the tug, it was discharged. On November 4th steam was raised in the hoister, and the cable hauled taut, but the vessel did not move because there was no tide. Nelson thought she moved some on the night tide. November 5th the weather was stormy, some sea washing over the starboard side of the Collins, and no effort was made to haul on the evening tide. The sea went down some time after 9 o'clock. On Sunday, the 6th, she went astern, but there was no increase in depth of water, and the vessel still remained about two and a half feet in the sand and mud, at high water, the rise and fall being then about four feet. On Monday, the 7th, the vessel continued to move astern. On this day the Baker slipped her moorings and sailed to the southward for a harbor, it being very rough at the time, and the sea washing over her bow. By the departure of the Baker the wreck-master was left with eight men, including four belonging to the Collins, two of the latter being disabled by sickness and working only half time. On Tuesday, the 8th, part of the deck-load was thrown overboard, consisting of car stuff, pitch pine, and very heavy, and that night she moved some astern at high water. At this time she was leaking some, and resort was had to the hand-pumps. Wednesday, the 9th, the work of throwing off the deck-load was prosecuted more rapidly by the aid of the steam-hoister, the object being to lighten the vessel at the stern, and the pumping was continued. Thursday, November 10th, the cable was hauled some on both tides, and by keeping the pumps at work six feet of water in the hold were reduced to three. Since Tuesday she had been hauled 75 feet or more. On Friday and Saturday there were some movements astern. On Sunday, the 13th,

after the vessel had stopped moving astern on the morning tide, the steam-pump and boiler were brought on board from the Baker, which had that day returned to her anchorage off the Collins, and the latter was pumped out between 9 and 10 o'clock, and hauled some astern that night. Monday morning, the 14th, the tug Battler arrived, in answer to a requisition made by Nelson on the libelants at Norfolk, during the absence of the Baker, for a steam-pump, and brought three extra men for the wrecking crew. The Collins was hauled some astern on the morning tide, but scarcely moved at evening, as the tide did not make much, and there was very little sea. Nelson says he expected to see her float on that night's tide, and kept the tug there to tow her up to Wilmington. Lib. test. 56. On Tuesday, the 15th, the sea being smooth, the tug went along-side of the Baker, and their joint crews hoisted the beach-anchor. "The tug-boat towed us out from the schooner Katie Collins the full length of the cable and chain. Then we let go the anchor." (The respondent's witness, Lewis, says that after the anchor had been shifted, the hawser was "straight astern." Resp. test. 51.) "I then discharged the steam-tug, as the wind was westerly, and making very low tide and smooth sea." "We hove some on the cable that night, but the vessel did not seem to move any. I think we hove by the windlass." Lib. test. 57. Wednesday, the 16th, was occupied in securing the remainder of the deck-load and moving it forward so as to trim the schooner by the head. The tide was very low, and the vessel leaked very little while lying still in a bed of sand. Thursday, the 17th, "we hauled on the vessel by the windlass; she moved very little." Friday, the 18th: "It began to make some sea during the latter part of the night before, and about between 12 and 1 o'clock I got up, and at 2 o'clock had all hands on deck, and the vessel began to go astern." Nelson, Lib. test. 59. Before the tide fell the Katie Collins was afloat. The distance of the beach-anchor in its first place from the Collins was 175 fathoms or more, in a S. S. E. direction, and half of the cable had been hauled in before the anchor was lifted and changed to another position. "I changed it because I wanted to discharge the steamer, as the wind was westerly and I knew it would take some little time before the vessel would float, as a westerly wind makes low tides and a smooth sea." Nelson, Lib. test. 64. Keeping the steam-pump on board, Nelson took command of the Collins, and sailed the same morning for Wilmington. The wind was strong and fair, but the rudder-stock was sprung and the vessel steered badly. On Saturday, the 19th, between 5 and 6 A. M., she ran aground to the northward of ship John Light, in the Delaware bay, and laid there until about dark, when she was spoken by the tug Inca and taken in tow to the Christiana, where she arrived the same night. This is substantially the wreck-master's narrative of the work, as it progressed from day to day, of hauling off the Collins and bringing her to Wilmington.

After testimony had been taken on both sides, and before the ar-

gument in the court, a motion was made on the part of the respondent for leave to amend his answer by striking out the last sentence thereof, and inserting in lieu of the same these words, to-wit:

"On the contrary the respondent avers, by reason of the premises, and by reason of the damage and injury done to said schooner by the unskillful manner in which said salvage services were performed, the libelants have either wholly forfeited all claim to a salvage reward, or should be awarded such a sum as will place their claim as in the lowest order of merit," etc.

Due notice was given to the libelants of the intention to submit this motion, and of the taking of additional testimony under the amended answer. I can see no valid objection to the allowance of this motion under the twenty-fourth admiralty rule, and as it is made to the discretion of the court, it has been granted without terms. From the additional testimony it appears that about two months before the Collins went ashore she had been largely repaired, nearly rebuilt, and that after she was hauled off upwards of \$2,000 were expended in putting her in good condition. The answer, as originally filed, denies that the officer and men employed by the libelants were skilled for the salvage service by them undertaken, "but, on the contrary, said officer did not evince a high degree of intelligence in directing his efforts, and spent twelve days in fruitless exertion, and finally abandoned a course of action which the master of the schooner, from the beginning, condemned and protested against."

It is contended by the respondent that the work of getting the vessel off was unnecessarily prolonged by the want of good judgment and intelligent action on the part of the salvors, and that in consequence of this, and of their unskillful management, the vessel was badly strained and damaged by pounding on the beach for so many days, when by proper means and well-directed efforts she could have been floated in a few hours. The respondent insists that the first position of the beach-anchor was the result of an accident—the parting of the Rattler's tow-line just before it was let go, when the Baker was to the south and off the port quarter of the Collins. The admissions and conduct of Nelson and the log-book of the Collins, as well as the testimony of the respondent's witnesses, go very far towards sustaining these positions, which are still further supported by the speedy floating of the vessel after the beach-anchor was moved directly astern of her. The statements of the members of the working crew are contradictory or conflicting, but the actual occurrences, as detailed by all of them, appear to confirm the causes of delay as alleged by respondent. The master of the Collins protested against placing the anchor so far south, instead of directly astern, by asking Nelson "if he was going to haul her off sideways." Nelson's excuse is that he laid the anchor in a southerly position from the Collins, because there was nearly a dry shoal to the northward of her, and the direction of the anchor was the nearest for deep water. In the opinion of others this shoal or reef was of advantage in affording

protection from the north and east winds and the ocean currents. The prospective peril was a south-east gale, which did not come.

After looking at the whole testimony, and observing the slow and at times scarcely perceptible progress made by the salvors, it is difficult to resist the conclusion that they were unfortunate, at least, in the outset, and that, having committed a mistake in letting go the anchor so far to the south, they were equally unfortunate, if not willfully in fault, by persisting in keeping it there so long as they did. They worked from the third to the fifteenth of November, with the cable at a considerable angle with the length of the schooner, dragging her sideways down the beach. Nelson admits that the cable was two points to the south; others testify to four or five points. Lib. test. 74. After between one-half and two-thirds of the cable had been hauled in, she still remained fast in the sand. Nine hundred feet out from the place where the schooner ran ashore were two fathoms of water, (Lib. test. 78,) and there was no necessity for changing the position of the anchor, if Nelson's theory was correct. The cable and chain were 175 fathoms long, of which 130 had been hauled in. Twenty fathoms more would have floated the schooner, if the anchor had not previously dragged, and Nelson was positive that it had not. Lib. test. 76. After the anchor was moved, on Tuesday, the fifteenth of November, the tides were lower, owing to the prevalence of westerly winds, and the vessel made very little progress until early in the morning of Friday, the 18th, at high water, when she went off. Lib. test. 57. The water had been higher before the 15th than it was after that day, and the schooner finally floated on a medium tide. It is apparent that the wreck-master was either deficient in judgment and skill, or that he erred against his own knowledge and experience in keeping the anchor where it was first planted for such a length of time, and this, too, in the face of the protest of the master of the Collins, of the complaints of the men, and of the inability of the wreckers to get her off.

The prompt movement of the schooner on a moderate tide, after the cable had been moved directly astern, makes the original mistake more glaring. The testimony of the respondent's witness, Lewis, allowing it equal credit with that of Nelson, proves the first position of the anchor, whether accidental or designed, to have been wrong. Lewis is a wrecker of 20 years' experience, familiar with the business, and speaks with confidence. He went to the wreck on the Saturday before the anchor was shifted. He says the anchor was about S. by W. from the vessel. It led out of her port-quarter chock, and in his opinion it was impossible to heave a vessel off broadside that was buried 15 inches keel down in hard sand. After the anchor was shifted the hawser led about S. E. by E., as near as possible, and in three tides the vessel came off. If the beach-anchor had been placed directly astern in the first instance, she would have come off on the first tide, as the tide on which she floated was lower than they had had. This

is the substance of Lewis' opinion on this point. Resp. test. 48-51. It is clear that with the cable running at an angle off the port quarter it would require greater power to move the vessel than if the force had been applied directly astern. Nelson says the effect of the purchase was to move her around and gradually astern. Lib. test. 64. Again: "She would slew her stern a little to the southward while going astern, and while the tide was falling she would slew back again nearly in her former position." Nelson, Lib. test. 93. The Baker had the means of properly laying and taking up the beach-anchor and cable, weighing, respectively, 4,000 and 3,500 pounds, but it was more difficult to change the position of the anchor, as, the cable being wet and heavy, there would be a great deal of extra weight to drag. Lib. test. 69. This may explain but does not justify the delay in moving the anchor. The barge Baker was absent, with the much-needed steam-pump, from Monday till Saturday. She had sailed for a harbor from an impending storm, which soon subsided, and could not return until her crew had been increased. The two trips of the tug Battler would not have been necessary had the Baker remained at her anchorage, or had been able to return there in a day or two. Nelson and Lewis agree that the anchor could have been raised and shifted to its new position by the Baker without the aid of the tug, and on the first arrival of the latter with the supplementary steam-pump, one had already been put to work on the Collins. The second trip of this tug was of still less service to the respondent. The schooner went ashore at a right angle to the coast line, and the natural plan, under ordinary circumstances, would have been to draw her off in the same direction which she went on, but Nelson chose to try the experiment of working with an indirect purchase, and thus converted an accident into a blunder. The log of the Collins shows that on the fourth of November her first movement was "by the stern around the S. W. three-quarters of a point." The next day the tide was too low to start her. November 6th she went 20 feet astern. November 7th, "Worked her width to the south-west, or down the beach." November 8th, "Slewed her stern about one-half point down the beach." November 10th, "Hove her about fifty feet astern and sideways down the beach." November 14th, "Moved her a little astern down the beach, sideways." The next day the anchor was moved. The number of men employed by the libelants during the progress of the work, including the crew of the Collins, did not exceed eight or ten, except when assisted for a few hours by the crews of the tugs. The weather was neither tempestuous nor severe. The lives of the salvors were not endangered, and the salving property was subjected to a minimum of risk. The value of the Baker, with all her appliances, did not exceed \$5,000, and probably \$3,000 would be an ample estimate. The tug-boats employed were not at the risk of the libelants. The agreed value of the Collins and her cargo is \$10,000.

The Baker Salvage Company, with a capital of \$90,000, is regu-

larly engaged in the wrecking business, and hold themselves in readiness at all seasons to go to the assistance of wrecked or disabled vessels. Their occupation is not only legitimate, but highly useful and important, and deserves to be encouraged. Salvage service fairly and skillfully rendered is entitled to more than ordinary compensation, as measured by the value of the same work done on land, but each case must be dealt with according to its own peculiar circumstances; and while the nature of the service is the same, the degree of merit to be awarded to the salvors depends upon their individual conduct: (1) The risk incurred by them; (2) the degree of danger from which the lives or property are rescued; (3) the value of the property saved; (4) the value of the property employed by the salvors in the wrecking enterprise, and the danger to which it is exposed; (5) the skill shown in rendering the service; and (6) the labor expended and the time occupied. *Post v. Jones*, 19 How. 161; *The Sandringham*, 10 FED. REP. 573. The learned judge who decided the last-cited case adds, as additional matters to be considered, the degree of success achieved and the proportions of value lost and saved. Where all these ingredients of salvage service concur, a large and liberal reward ought to be given; but where none or scarcely any are found, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*. *Marv. Wreck*, § 99. Salvage exceeds a fair remuneration for work and labor, the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but also, as an inducement to others to render like services. The claims of simple justice to the salvor do not ordinarily extend beyond a fair compensation for work and labor. All beyond this is a gratuity given or withheld by the courts upon grounds of public policy. But salvage may be reduced by want of skill or energy displayed by the salvors, or even forfeited by their misconduct or gross negligence; and the neglect, misconduct, or inefficiency of the master are imputed to the owner of the salving vessel,—especially of a wrecking vessel, for the master is then acting within the scope of the employment for which he was selected and appointed by the owner. Thus, whenever salvors, having the management of the business, fail to get a stranded vessel afloat at the first high water at which she might have been floated, had they employed the proper means, they must be considered as having failed in point of skill and energy, and must suffer the just and legal consequences of such failure, notwithstanding they may have saved the ship and cargo. If, in consequence of want of skill in sounding out channels, carrying out anchors, or navigating the vessel, or from any other omission of proper care or skill, the salvors incur unnecessary delay in extricating the vessel from its perilous situation, or get it ashore a second time, the salvage ought to be reduced in proportion to the degree of negligence or want of skill; and when the negligence is gross or willful, it should be wholly for-

feited. *Marv. Wreck*, §§ 106, 108, 219; *The Blackwall*, 10 Wall. 14.

The libelants promptly responded to the call for assistance made by the captain of the *Collins*, and proceeded with commendable dispatch to her rescue, but the subsequent management of the wreck-master was ill judged, and in consequence there was unnecessary delay in completing the work of hauling off the schooner. It is evident that the beach-anchor was at first misplaced, and the result was that the men employed by the libelants worked at a great disadvantage and with consequent injury to the schooner, which was pounded and strained for two weeks, when probably as many days would have been a sufficient length of time for the service actually rendered. There was also culpable delay in throwing over the deck-load, which was not begun until after the lapse of five days from the time the wreck-master went on board the *Collins*. The steam-pump was wanting for 10 days, when there was the greatest need of it to lighten the vessel. The hoisting-machine was not in good order, and gave out at the end, when the vessel was hauled off by the aid of her windlass. The chapter of accidents, or of mistakes, errors of judgment, and want of skill, was concluded by running the rescued vessel aground in the bay while yet in charge of the libelants.

The hiring of the tug *Battler* was really of no service to the respondent, as she was employed on her first trip to hunt up the *Baker*, which had run into Metompkin inlet for a harbor, some 12 miles south of the *Collins*, and could not return until her crew had been re-enforced. The steam-pump brought by the *Battler* was of no use, because the *Baker* came back to the wreck before the tug arrived. The tug's second trip might have been of use, and her employment then cannot be deemed altogether an unnecessary precaution.

Under this finding of the facts I confess to have felt much embarrassment in fixing the amount of compensation which should be given to the libelants, and have concluded, after a careful review of the law and evidence, that this court would not be warranted in decreeing a sum much, if any, in excess of the total amount of moneys actually expended by the libelants in their undertaking. Certainly they did not exercise the highest degree of skill, or apply their knowledge, experience, and energy to the best interests of the respondent. Their negligence and misconduct were not so gross, however, as to forfeit all claim for compensation, but sufficient to reduce the amount which might have been awarded to them had they acted with more intelligence and energy.

The actual outlay of money by the libelants, including what was paid for the hire of the *Battler*, of the propriety of which there has been some doubt in my mind, was about the sum of \$1,253.45, and for this amount a decree will be rendered with costs for the libelants.

THE GLADIOLUS.¹

(District Court, S. D. Georgia. June 9, 1884.)

PERSONAL INJURY—PRESUMPTION OF NEGLIGENCE.

Where a stevedore, engaged in his usual occupation, falls through an ordinary coal-bunker hatch that is used for stowing cargo, the presumption is of his negligence rather than that of the officers of the vessel.

In Admiralty.

Richards & Heywood, Garrard & Meldrim, and J. R. Saussy, for libellant.

A. Minas and Chisholm & Erwin, for claimant.

LOCKE, J. The libellant, Margaret McGinty, complains that her husband, Thomas McGinty, while employed as foreman of a stevedore's gang on board the steam-ship *Gladiolus*, on the nineteenth day of September, 1883, fell through a hatchway, which had been negligently and carelessly left open, and was so badly injured that he died from the effects of the fall in about six hours, and she brings this action for \$15,000 damages.

The only questions in the case found necessary to consider have been as to the negligence of the officers of the ship in leaving the hatchway uncovered, or that of the party killed in falling through it. The ship was constructed with what is known as a cross coal bunker, forward of the engine-room, used sometimes for reserve coal, and frequently for carrying cargo. This was separated from cargo hold No. 2 by an iron bulk-head up to the lower deck, and above that from between-deck No. 2 by a wooden partition to the upper deck. Through this partition or wooden bulk-head were two doors, twelve feet apart, each three feet and seven inches wide, leading from between-deck hold No. 2 into this between-deck coal bunker. Just inside this partition and between the doors, was the hatch through which McGinty fell. It was twelve feet athwart ship, and three feet fore and aft. Immediately over it, on the main deck, was a hatchway of the same dimensions. It appears from all the circumstances of the case, although it is not stated in exact language, that this portion of the ship had been fitted to receive cargo, and turned over to the stevedores. One of their gangs had been at work the day before, taking out the last of the coal, and sweeping and getting ready for cargo. On the morning of September 19, 1883, the gang, of a portion of whom McGinty was foreman, came down to commence stowing hold No. 2. They found the main-deck hatches all on, and removed those over hold No. 2, but the between-deck hatches they found off. They had received but two or three bales of cotton when the deceased passed through one of the open doors into the between-

¹ Reported by W. B. Hill, Esq., of the Macon bar.

deck of this coal bunker in search of "toms"—short pieces of wood used in stowing cotton—and fell through the hatchway. He spoke but a few words upon being taken out, and lived but a few hours.

It is urged in behalf of the libelant that it was gross negligence on the part of the ship's officers to leave this hatch off and the doors open, so that any one could go in so as to fall through it, and that although deceased was not actually assigned to work in that compartment it is usual and customary for the stevedores to go anywhere through the ship in search of dunnage. In reply it is claimed that McGinty had no business in this bunker, as they were not stowing it that day, and it was negligence for him to go there without having the upper hatches removed, if there was not sufficient light to see, and if there was light it was negligence that caused his fall, and that there was no negligence in leaving the hatchway open at the time it was. The leaving open a common between-deck hatchway while the vessel is lying in port, under ordinary circumstances, is not presumptive evidence of negligence on the part of the ship. This is not only shown to be the custom by the testimony in this case, but it has been so frequently commented upon in decisions as to be too well settled to be questioned. *The Victoria*, 13 FED. REP. 43; *Dwyer v. Nat. Steam-ship Co.* 4 FED. REP. 493; *The Carl*, 18 FED. REP. 655; *The Germania*, 9 Ben. 356; *The Helios*, 12 FED. REP. 732. While the falling through an open hatchway by a stranger, a landsman, visitor, or passenger on board a vessel might not be presumptive of negligence on his part, where such accident occurs to a seaman or stevedore, who is accustomed to hatches, their presence, necessity, uses, character, and location, the case is different, and unless the circumstances of the particular case are such as to rebut it, the first presumption is of his negligence.

Do the circumstances in this case overcome the presumption in favor of the claimant, and establish that in favor of the libelant? This was not, as in the case of *The Helios*, *supra*, a small, unused hatch, without coamings, but was one for the frequent, if not general, stowage of cargo; such as, the learned judge in that case remarks, "stevedores must at their peril look out for, and are presumed to know about." There was a main-deck hatch directly above it, which, although closed at the time of the accident, was notice, if any such was needed, of the existence of this one. There was no presumption that any of the between-deck hatches were closed, as none of them were found to be when the main-deck hatches were removed; but, on the contrary, the presumption to a careful man would have been that they had been left off intentionally, to dry, air, and ventilate the ship. The testimony shows that but a short time before, deceased had assisted in stowing a ship of similar construction, with like bunkers and hatches as this, and in that case helped stow the bunkers, and he knew these were to be loaded. He had been stevedore for years, and was familiar with the hatches and their locations. The amount

of light in the bunker at that time becomes quite an important question in the consideration of this case. One of the witnesses for libellant says "it was some dark;" the head stevedore says he thinks there was light enough for a careful man to see; while the officers of the vessel speak of its being "total darkness." This idea of total darkness I cannot accept as being applicable to the condition of things shown to have been at the time of this accident, and can only believe that they must have had reference to times when the main-deck cargo hatch No. 2 was very nearly or quite closed. It was a bright, clear morning in September, about 9 o'clock, the vessel heading south-easterly. The main-deck hatchway, 25 feet long by 12 feet broad, was fully open and unobstructed. Within three feet and seven inches of this hatchway was the bulk-head or partition, with two open doors, each three feet and five inches wide, only twelve feet apart, and directly in range with the corners of this large open hatchway, and it seems absolutely inconsistent with the principles of natural science that this bunker could have been so dark that a reasonable man, using ordinary care, could not have seen an open hatchway. In either event the conclusion of negligence on the part of the deceased seems compulsory. Was it as dark as some witnesses state, a careful man would not have entered without a light; or, if he had, it would have been in such a careful manner that the coamings of the hatch would have been a warning; and if it was as light as the circumstances appear to show it must have been, ordinary care would have shown the open hatch. Had a careful master that morning, before the arrival of the stevedores, had his attention called to the condition of the hatches, I cannot consider that he would have deemed it necessary to send men below to close this one to prevent the possibility of some stevedores' falling through it. It had, for all intents and purposes, at this time become a cargo hatch, and could reasonably be treated as such.

The conclusion on these points precludes the necessity of considering the numerous other questions raised in the argument.

Although the case is one that appeals strongly to the sympathy of the court, under the law I can reach but one decision, and the libel must be dismissed; but since there may have been, before a full and careful investigation of the case, reasonable grounds for considering the ship liable, and as I believe the suit has been prosecuted in good faith upon the principle of equitable discretion in such matters in courts of admiralty, it is ordered that the claimant pay the costs.

THE LLOYD.¹

(District Court, S. D. Georgia. June 9, 1884.)

CONTRACT OF AFFREIGHTMENT.

Where a vessel is chartered for a lump sum, and rechartered to carry lumber at a rate per thousand, it is for the original charterer to see that she is provided with such lengths and sizes as will give a full cargo; and if her master receives and stows in good faith what is furnished by the merchant under the sub-charter, and it is of such sizes that there is not as much loaded as would be of different kinds, no action lies against the vessel. Amount of lumber carried per ton depends upon class and length of same, and build of vessel. The burden of proof is upon him who alleges fraud in receiving and stowing a cargo.

In Admiralty. Libel *in rem*.

Garrard & Meldrim, for libellant.

Chisholm & Erwin, for respondents.

LOCKE, J. The libellant chartered this vessel for a lump sum to load a cargo at Savannah for some European port, "the stevedore at Savannah to be appointed by charterer, at ship's expense;" and rechartered her to load with lumber for Cadiz; rates under second charter to be by the thousand, "not exceeding two hundred and eighty thousand, all under deck." She came to Savannah, and her agent, Peterson, reported her arrival, and that she would soon be ready to take in cargo, and offered his services to represent charterer's interests, and in reply was requested: "Engage a competent and good stevedore, who understands his work, as from the charter-party you will notice that the vessel has to employ charterer's stevedore." In accordance with this request Peterson gave notice to the shippers, who had rechartered and were to furnish cargo, of her readiness, and employed a firm of stevedores to load, which they proceeded to do with the lumber as furnished. The original charterer and libellant herein arrived from New York as the loading was being completed, and found that instead of having stowed 307,000 feet under deck and 20,000 feet on deck, as he alleges she should have taken, she had received but 240,532 below deck, and the master refused to take any on deck, whereupon he filed this libel for damage in loss of freight on the difference between what she had on board and what is alleged she should have taken, at the rate of \$17 per thousand for that under deck and two-thirds that rate for a deck-load.

Two questions are therefore presented,—one of fact, and one of law,—namely, was the vessel loaded with a full and complete cargo? and, if not, who is responsible for such shortage—the charterer or the owner? The only evidence introduced by libellant to sustain the allegations of the libel in regard to what would be a full and complete cargo for the vessel, is that of several stevedores and shippers of lumber as to the amounts per ton generally carried from this port. They

¹ Reported by W. B. Hill, Esq., of the Macon bar.

generally agree that the amount depends in a great degree upon the character and sizes of the lumber in comparison with the build of the vessel. Both the master and stevedore testify directly that, considering this, the vessel was loaded with as much as could be put into her, and the only question to be decided is whether the fact that this vessel had on board only some 529 feet of lumber per ton of measurement, when vessels average 650 feet or more, is sufficiently accounted for by the size and character of the cargo and shape of the vessel, to overcome the presumption of fraud arising from such fact. The first presumption is of innocence, and reasonable and honest compliance with the terms of the charter-party in taking in a full and complete cargo; but when the cargo is shown to have been so much less per ton than is usual, that presumption is overcome, and a new one arises. In regard to the character of the cargo, the first item of evidence appears in letter from Peterson to Baitzer, the libellant, before the loading commenced, in which he mentions there being no small stowage in the cargo. This, of course, is not evidence to establish this; but the fact that this language was used at this time in connection with his having been selected to employ a stevedore, may, I think, be considered with other testimony upon the same point. The specification shows but about 15,000 feet under 25 feet long, and but 135 pieces under 20 feet, while the greater portion of the cargo is long and large. Bergman, the stevedore, says the lumber was large, with a very small quantity of small sizes; the rest of it was very bad for stowing such a ship. He says: "The cargo was not suitable for the vessel. With small stowage she could have taken some more lumber, but I could not put in any more of the stuff furnished." He also says: "The cargo was stowed as well as it could be stowed, considering the lengths furnished." Small stowage is usually so stated. It is under 20 feet in length, and a vessel requires from 5 to 10 per cent. of the entire cargo to be made up of this class. In this cargo it appears that out of 240,000 feet there was but 6,669 feet of what is known as small stowage, and of this only a portion—135 pieces—was under 20 feet in length, while nearly a third was made up of large, square timber, running from 12 to 18 inches square, only one stick of which was but 30 feet long, and but five under 40 feet, and from that up to over 60. Mr. Salas, the merchant who furnished the cargo, says there was no small stowage, and he told Peterson so; but afterwards, upon the request of the master or stevedore, he ordered 10,000. He says: "The stevedores did worry me so much about small stowage that I ordered Mr. Stillwell to let them have ten thousand." But of this Mr. Stillwell says but 6,669 feet was furnished. Holland, the inspector, thinks there was necessity for more small stowage, as he saw three or four beams left unfilled. It appears that all the small stowage that was furnished was used. The master says he went for small stowage to Mr. Holland three times before he got the 5,000 feet, until he told them that he didn't care whether they let him have it or not. He

says: "I asked for it repeatedly." This agrees with what Mr. Salas says about the stevedores worrying him until he ordered 10,000 feet. I am satisfied that both the master and stevedore made all reasonable exertions to obtain such small stowage as was required.

The stevedores and merchants who have testified in regard to the amount that should be carried, all agree that it depends upon the specifications and adaptability of the lengths to the class of vessel. There was, as has been shown, comparatively little short or small stuff in the cargo. The vessel appears to have been sharp, or, as one said, "sharp full." The master says she was sharp—sharper than usual—in the lower hold, fore and aft. She had no between-deck, but between-deck timbers, mid-way between the deck and floor, about 12 inches square. The depth of hold was but about 14 feet. In the widest part of the vessel the width outside was but 29 feet, and inside she must have been considerably less. It will therefore appear that, in order to stow such a vessel to advantage, there must have been fully one-tenth, if not one-eighth, of it under 28 feet, and much of it under 25, and so on down in shorter lengths, even to have filled the places between the beams, where the lumber could not have been stowed fore and aft. But the specifications filed in evidence show that of the entire cargo but about 16,000 feet was in pieces under 28 feet in length. This is as to the beam-filling alone, and in a sharp vessel much lumber of comparatively short lengths is required in the bows and run for advantageous stowage.

I am satisfied, from a careful consideration of the question, that the cargo was not adapted to the vessel; but let us examine whether or not the difference between what was laden on her, and what should have been put on board, can be accounted for. All the witnesses seem to agree that about 650 feet to the ton is an average cargo, where the specifications of the cargo are adapted to the vessel, but they do not all agree whether or not that should include the deck-load. Salas says vessels will carry from 650 to 700 feet to the ton, including small stowage and deck-load. Butler, a stevedore, thinks vessels will carry from 650 to 700 under deck, while Roberts thinks 700 feet per ton is a fair average, and he never knew of vessels going without a deck-load. This deck-load may be from 20 to 33½ per cent. of that under deck. This would leave from 525 to 585 feet per ton under deck.

It is not disputed by the libelant, as I understand, that there was not a sufficient amount of small stowage to make her stow to advantage, but it is claimed that it was the master's fault that this was not procured, in order that the vessel might be filled in measurement, regardless of what the cargo was as long as it was lumber, and that he should have refused to go on loading, even until he could have obtained pieces to fill the entire room of the vessel, before it could be understood that he had taken a full and complete cargo. With this view of the case I cannot agree. The vessel had been rechartered by libelant to one La Tassa, who had ordered from merchants in Sa-

vannah a cargo of lumber of certain sizes and lengths by specifications. She was chartered to take this lumber and none other, and the only right the master had was to demand such small stowage as would make the cargo stow safely, so as not to endanger the ship. If the cargo provided was not such as to give suitable stowage, so as to make a "full and complete cargo" according to measurement, the right of action, if at all, is against the sub-charterer and not against the ship.

The reason why the vessels referred to have averaged so much more per ton than the Lloyd took in, is, I consider, fully explained by the facts—*First*, that each vessel was selected by the specification for a particular cargo, and adapted to it; and, *secondly*, that the ship has had a special interest in getting such a cargo as would give her the greatest measurement, or the charterer, where the charter has been for a lump sum, has had an active agent present to look after his interests; and also the fact, as I think, plainly appears that this vessel was not adapted to carrying a lumber cargo unless it contained quite a large proportion of short lengths. These reasons, I think, justify the presumption of honesty and reasonable diligence on the part of the master, which has not been overcome by any evidence on behalf of the libellant.

The charter under which the vessel loaded specifies a full and complete cargo, "all under deck." The libellant is therefore estopped from claiming damage for the master's refusing a deck-load, even if the vessel could have carried it safely, of which the evidence, though, raises a doubt.

This conclusion renders unnecessary a consideration of the question as to whether or not the stevedore was agent of the ship or charterers.

The libel will be dismissed, with costs. .

THE GRID.¹

(District Court, S. D. Georgia. May 1, 1884.)

SALVAGE—PILOTS ACTING AS SALVORS.

The service rendered by pilots must be beyond their ordinary duties as pilots to entitle them to salvage; but where there is unusual and extraordinary risk incurred in rendering service to a vessel in distress, although it be but a pilotage service, courts of admiralty may give an additional compensation to encourage meritorious action in such cases.

In Admiralty.

Robert Falligant, for libellant.

¹ Reported by W. B. Hill, Esq., of the Macon bar.

Chisholm & Erwin, for claimant.

LOCKE, J. The libellant, Michael P. Usina, a pilot belonging to the port of Savannah, while returning from his cruising grounds outside the bar of that harbor, on the nineteenth of January, 1884, discovered the Norwegian bark *Grid* coming up from the southward and running in, in the direction of Stone Horse shoal. He waved his flag and made what signals he could, but she kept on her course and soon struck. There was a strong southerly breeze, with a heavy sea, it breaking around and sometimes throwing the spray over her. Libellant came as near the bark as it was considered safe with his schooner, lowered his small boat, and boarded her with one man. While coming around under her bows, he shipped a sea that nearly filled his boat. The bark went ashore at low water, where the tide rises about five feet, and was pounding, and soon commenced leaking. Libellant ordered the anchor to be let go to prevent her dragging further upon the shoal, as the tide rose, and directed the bark's crew to keep pumping, which they did. As the tide rose the vessel floated, and the wind having come around to the westward, but having died out until it was too light to enable her to stem the rising tide, he piloted her through and over the shoals into Tybee roads. There was plenty of water, but she needed careful piloting. She was there taken in tow by a tug and brought to the city. She was injured some and leaked badly, having about six feet of water in her when she reached the dock. When libellant left his pilot-boat he ordered her to send out a tug from Tybee, but before her arrival there the tug had learned of the bark's being aground and gone out. She was not able to come near enough to take a line, and did nothing until the bark reached Tybee, when she took her in tow.

The connection of a pilot with a vessel in distress, his duty towards her, and his right to extra compensation for efforts in her behalf, always raise delicate questions as to just how far his position as pilot demands his services, and when his labor as salvor begins. There are frequently cases where the services are so unmistakably salvage and not pilotage, that there is no difficulty in determining his rights; but in others the character of the service is not so distinctly marked, and its nature more difficult to determine. Where a vessel is discovered aground and is relieved from the bottom by a pilot and his crew by carrying out an anchor, making jettison of cargo, or heaving at windlass or capstan; or where a vessel is leaking badly and is kept afloat by a pilot's crew pumping; or service is rendered by working an abandoned vessel, or one whose crew are worn out or disabled by sickness, and the vessel is in danger,—there can be no question but what such service would be one of salvage rather than pilotage, and that he would be entitled to compensation as such; but when the labor performed and service rendered consist only of such acts as the duty of a pilot demands, notwithstanding the fact that the vessel is in distress, or his exposure is unusual and the risk incurred more than

ordinary, it is against public policy to construe it as salvage; but, whenever unusual compensation appears to be demanded, it is given as extra pilotage.

The peculiar knowledge required of a pilot is as to the depth of water, and the rise, time, and strength of the tides; and where these items of knowledge only are used, or orders given based upon them, it can at no time be considered more than pilotage service. It is also the duty of a pilot at any time, in order to prevent a vessel in his charge from grounding, to let go an anchor; nor could such an act be considered beyond what might be demanded of him as pilot, or entitle him to extra reward. Nor can danger in boarding a vessel be taken into consideration, when unattended by other peculiar circumstances, to give salvage compensation, as it is in the worst weather that his services are the most required and demanded, and his duty becomes most imperative.

In this case, had the libelant reached the bark while she was approaching, or even while in the breakers, but before she had struck, and by correct and timely orders succeeded in extricating her from the difficulty with a skillful use of the sails and helm, can it be claimed that he would have been entitled to extra compensation because he had encountered danger in boarding her, or on account of the little water under her keel? I think not; for if such questions could be successfully raised in such a case there would be no end to demands on account of the severity of the weather, or the danger encountered in such services, or the shoalness of water, and danger of the vessel on such account, and any fixed rates of pilotage would be useless. The vessel when boarded was not afloat, and could not at that time be piloted; neither the libelant nor the man with him did any labor in extricating her from the bottom or in pumping, but his knowledge of the rise and direction of the tide, as pilot, enabled him, by ordering the anchor let go, to hold her in her position until the tide floated her, when his labors as salvor, if he could by any possible construction ever be so considered, ceased, and he became a pilot. There can be no question as to this. Had he found the vessel safely anchored at high tide in the place from which he piloted her, it could not be claimed that he was doing more than his duty as pilot in piloting her in; no more could it because he was on board before. But the vessel was aground in a dangerous place, and the weather bad; the evidence shows conclusively that the risk in boarding her was extraordinary and unusual; and the promptness and readiness to go to her aid praiseworthy, and entitled to recognition.

In *The C. D. Bryant*, 19 FED. REP. 603, which has been cited by claimant, the facts seem nearly similar, with the exception that in that case Judge DEADY did not consider that the libelant incurred even the ordinary danger of a pilot service, while in this case it was certainly considerable and unusual, although perhaps not greater than is occasionally but not frequently met in boarding vessels at

sea in tempestuous weather. In that case the libel was dismissed with costs, but in this, I think, the difference in the state of the weather and sea, and consequently the risk incurred, will justify a different decree. The bark was in ballast; her expenses, port charges, and repairs something over \$7,000; her value when repaired from ten to twelve thousand dollars, according to the demands of the market; leaving the net value saved from three to five thousand dollars. The libelant has presented a claim for pilotage, and been paid in full, and a tug paid extra towage from Tybee. The claimant has made a tender of \$250, and deposited that amount in the registry of court. I consider that amount will amply compensate for the extraordinary risk incurred, and that it is sufficient to encourage to like exertions under similar circumstances.

There will be a decree in favor of the libelant for \$250, and the costs incurred prior to the time of the deposit; subsequent costs to be deducted from the money on deposit, and the residue paid him.

THE PIONEER.¹

(District Court, S. D. Georgia. June 7, 1884.)

1. SEAMAN'S WAGES.

Where suit has been commenced by a seaman for wages in a state court against the owner, but it has been dismissed before hearing, an admiralty court may entertain jurisdiction upon the same subject-matter.

2. SAME—COURT MAY DECREE WAGES, WHEN.

A court of admiralty may decree seaman's wages, although earned on a steamer of less than five tons, engaged in carrying freight and passengers upon navigable waters.

In Admiralty.

Geo. A. Mercer and *M. A. O. Bryne*, for libelant.

J. J. Abrams, for claimant.

LOCKE, J. This is a libel for seaman's wages, the libelant having been engineer on the steam-boat *Pioneer*. It is not denied that the amount sued for is due, but it appears that (1) the libelant had commenced an action against the owner of the boat under the lien law of the state, but subsequently came before the commissioner in a petition for seaman's wages, and upon obtaining a certificate of probable cause for action had dismissed the former suit at his costs; and (2) that the vessel upon which the services were rendered was a small steam-yacht or launch of less than five tons measurement, and neither enrolled nor licensed; both of which grounds are urged to defeat the jurisdiction of this court.

¹Reported by W. B. Hill, Esq., of the Macon bar.

The steamer was inspected and licensed to ply for a distance of a hundred miles on the bays, sounds, rivers, and waters along the coast of Georgia, and to carry not exceeding 20 passengers, and had been engaged in carrying freight and passengers between Darien and Hammersmith landing, about eight miles, and out to Sapello High Point. The residence of the libelant is not shown, nor does there appear to have been any privity of interest, relationship, or acquaintance between him and the owner; but it is testified that when he was employed it was remarked that Mulligan, the then owner, "was good for his wages; if not, the boat was."

It is claimed that, having elected his forum, the libelant is estopped from abandoning it and bringing suit in another, and *The Highlander*, 1 Spr. 510, is relied upon. The decision there is that "a seaman's lien for wages is not defeated by a previous attachment of the vessel at common law in a state court, abandoned before the filing of the libel." Certainly that in no way declares that it would have been lost had not such suit been abandoned before the filing of the libel, but had been before the hearing of the case. The court was then only considering the case before it, and its decision cannot go beyond the state of facts therein existing. In this case the former suit was against the owner, and not *in rem*, nor was the property, at the filing of the libel, under attachment from another tribunal, which would prevent the valid execution of one under this. The suit in the state court had been dismissed at plaintiff's costs before this case came on to be heard. In the state court the seaman's lien is not the prior lien, without exception, as in the case of seamen's wages in admiralty. The matter has not been adjudicated, nor is there any other action now pending; and that is all that is necessary for this court to consider, if it has jurisdiction otherwise. This was a contract for services to be performed by assisting in the navigation and working of a boat or vessel on navigable waters by a person who appears in the case to be a marine engineer, and if the court has no jurisdiction it must be from facts sufficient to establish an exception to the general rule.

In regard to the size and character of the boat, and character of the services rendered by libelant, *The Bolivar*, Olcott, 474, and *The Farmer*, Gilpin, 524, have been cited and relied upon. In *The Bolivar*, the principal ground for dismissing the libel was that the lien had been lost by unreasonable delay until it became stale, and the character of the vessel, and the relations existing between the owner and libelant, were but incidentally mentioned, and not as controlling or determining the action of the court. In *The Farmer*, the small craft was engaged in carrying wood across the Delaware river to Philadelphia, from a place nearly opposite, and the opinion of the learned judge shows that he considered the objection to the jurisdiction on account of the general business and occupation of the libelants as laborers, they being engaged in navigating the boat but about eight hours a week, and because applications from the same

class of persons, whom he did not consider seafaring men, had become, as he plainly declares, annoyingly frequent. In this case the character and occupation of the libelant was that of an engineer of a steam-boat, engaged in transporting freight and passengers on water within the ebb and flow of the tide, in a small way, it may be true, but, nevertheless, sufficient, I think, to determine jurisdiction, and if on account of any local or temporary reason a judge may have declined to entertain jurisdiction, such decision need not be binding in cases where it is considered circumstances so differ that they justify another conclusion. In this case the commissioner, after examination, certified the case to this court. The libelant has, I consider, an action *in rem*. He has dismissed, at his own costs, the suit pending in the local court against the owner. There is no claim that the money is not justly due, and it would certainly be a hardship, not demanded by justice, to dismiss him without redress. Had the case come before me as commissioner originally, I will not say but what I might have referred the libelant to the local court, in which his suit was then pending, if as economical and speedy justice could have been obtained; but courts of admiralty are to give inexpensive and speedy redress to this class of litigants, and for this class of services, and I do not think the smallness of the vessel should protect it from an action *in rem*.

Let the decree follow for the amount proven,—\$129.67,—with costs.

THE HAROLD.

(District Court, S. D. New York. June 30, 1884.)

PERSONAL INJURIES—FELLOW-SERVANTS—MASTER AND SERVANT—COMMON UNDERTAKING.

The libelant was one of several men procured by a stevedore to shift coal in a vessel, all of whom were paid for by the ship, by the day, and he was injured, without his own fault, by a board which fell through the hatch in consequence of the winchman's starting up the steam-winch without notice to his fellow-workman, whose business it was to tend the ropes at the platform. The winchman was furnished by the ship and not by the stevedore, and was a competent person. *Held*, that all were in the common service of the ship, and were co-laborers in the same undertaking, and that the ship, therefore, was not liable for the injury, no breach of any duty owed by the ship or her officers being shown. *Held, also*, that it was immaterial that the winchman was paid by the month directly by the ship, and the other men by the day, through the stevedore; the former being under the direction of the men at the platform when to start or stop, and all being under the common supervision of the stevedore, or his foreman, and employed in a common undertaking.

In Admiralty.

L. C. Dessar, for libelant.

Jas. K. Hill, Wing & Shoudy, for claimants.

BROWN, J. The libelant was one of a number of men procured by a stevedore to shift coal in the steamer Harold. He was at work on the twelfth of December, 1880, in the hold beneath the after hatch, in tending and filling the tubs as they were lowered and raised. While so employed, a plank fell through the hatch and struck his foot, producing a severe injury, for which this action is brought. The hatch above was mostly covered by two platforms running athwart ships across the fore and aft end of the hatch, leaving a space of four or five feet between, sufficient for the tubs to be hoisted through. One of the stevedore's men stood upon each platform guiding the ropes as the tubs were hauled up, so that they should not hit the platform. It was the business of the stevedore to arrange this platform, and he had done so. The two men employed there had, of their own volition, obtained two other planks, which they laid fore and aft across from one platform to the other, near the coamings. The tubs were raised by a steam-winch, which was tended by a man supplied for that purpose, as was customary, by the vessel, and who acted under the orders of the men at the platform; all the men about the job, except the winchman, being procured by the stevedore, and paid by the day by the ship. About 9 or 10 o'clock in the forenoon the winch was stopped for about five minutes to be oiled, and to have some bolts screwed up. It was a very cold day, and during this interval the men on the platform stepped off, and walked about the deck to keep themselves warm. It was the duty of the men at the platform to give orders to the man at the winch when to stop, go ahead, or back. When the winch had been fixed, the man that tended it started it up, without any order from the men at the platform, and while they were a few feet distant from it, and without giving notice to them that he was about to start up. A tub which was a few feet only below was thus raised up against the platform and lifted it up, and thereby displaced one of the loose fore and aft planks, so that it fell through the hatch and injured the libelant, as above stated.

The libelant was without fault, and was injured in the performance of his duties upon the ship. He cannot recover against the vessel, however, except upon the ground of some fault attributable to the ship; that is, some negligence or remissness on the part of her owners or officers in respect to some duty which they owed to the libelant in connection with the service in which he was engaged. In *The Kate Cann*, 2 FED. REP. 241, 8 FED. REP. 719, the ship was held liable for the giving way of some braces, which caused injury to the libelant; in *The Rheola*, 19 FED. REP. 926, for the insufficiency of a chain supplied by the ship for hoisting. In *Dwyer v. National Steamship Co.* 4 FED. REP. 493, the libel was dismissed because the ship owed no duty to keep the hatch covered, or the guard over it properly secured.

Upon the evidence in this case there appear to have been three faults that contributed to the injury: *First*, and chiefly, that of the

man at the winch in starting it up without orders, and without notice to the men at the platform; *secondly*, negligence in the latter in the use of loose boards at the platform in no way secured against falling through; *thirdly*, the absence of the men from their post at the ropes when the winch was started up. Considering the coldness of the day, however, the momentary absence of the men in stirring about to keep themselves warm while the winch was being fixed, was not unreasonable, and any fault in this regard is of a very minor character. The men on the platform, as well as the libelant, were substantially in the employ of the ship, though procured by and through the stevedore. The stevedore did not do this work by any independent contract. The agreement was that the coal should be shifted "by day's work, at the ship's expense," and the stevedore procured all the men except the man at the winch, who was furnished by the ship. The wages of the men were paid by the ship through the stevedore. The winchman was a co-laborer with the stevedore's men, and was engaged in a part of the same employment; namely, that of shifting coal. Had he been procured by the stevedore, the case would clearly have fallen under the general rule that laborers take the risk of injuries arising through the negligence of their co-laborers in the same common service. *Hough v. Ry. Co.* 100 U. S. 213; *The City of Alexandria*, 17 FED. REP. 390-392, and cases there cited; *The Victoria*, 13 FED. REP. 43.

I do not see how any distinction can be made in the application of this rule from the mere circumstance that the man at the winch was paid directly by the ship, by the month, while the other co-laborers were paid by the day, by the ship, indirectly through the stevedore who procured them. The reason why the laborer cannot recover is because he is regarded by the law as taking the risk of the negligence of fellow-laborers engaged in the same common undertaking. He does not, however, take the risk of the fitness or sufficiency of the machinery, structures, or implements furnished by the employer, nor the risk of negligence of servants or laborers in any independent department of work, such as the stowage of the dunnage was in the case of *The Kate Cann*, *ut supra*. Against these he has no means of protecting himself, nor can he be reasonably supposed to assume the risks arising from a kind of work wholly independent of that about which he is engaged.

The man at the winch, in this case, was performing a necessary part of the same work for which the libelant was employed. The handling of the winch was as essential as tending the ropes and the tubs at the platform, or shoveling the coal in the hold. The risk of any inattention by the man at the winch was as plainly one of the risks of the libelant's employment as the risk of inattention by the men at the platform. *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Same v. McGuire*, Id. 307; *Thompson v. Chicago, M. & St. P. Ry. Co.* 18 FED. REP. 239; *Wood v. Coal Co.* 121 Mass. 252; *Crispin v. Bab-*

bitt, 81 N. Y. 516; *Buckley v. Gould, etc.*, M. Co. 14 FED. REP. 833. In the case last cited, and the note thereto, (page 841,) the authorities are collated as to who are to be deemed fellow-servants; and many additional ones will also be found in the note to *Charles v. Taylor*, in Moak's English Reports, vol. 30, pp. 337-349. The man at the winch was, in this case, acting under the immediate orders and direction of the stevedore's men at the platform. It is immaterial that he was paid directly by the ship. *Rourke v. White Moss Colliery Co.* 2 C. P. Div. 205; *Murray v. Currie*, L. R. 6 C. P. 24; *Johnson v. Boston*, 118 Mass. 114; *Ill. Cent. R. Co. v. Cox*, 21 Ill. 20. All the other men being paid by the day by the ship, they were in fact under the ultimate control of the officers of the ship, although the general superintendence of the work was in the stevedore and his foreman. This superintendence, however, included the winchman as much as the others; so that it is really immaterial here whether the men be regarded as the servants of the stevedore or the servants of the ship, since all were under a common direction and in a common service.

The evidence does not show that the work was stopped through any unfitness of the winch, or that the fixing required was different from what is occasionally needed in oiling and turning up the screws. Nor does it appear that the man at the winch was incompetent or unfit for his position, or that any negligence or remissness is chargeable upon the officers of the ship in selecting him for that work. The duties to be performed by him were of a very simple character, being only the handling of a brake at the winch, and the accident is attributable chiefly to his momentary inattention in starting the winch without notice.

As there appears to have been no remissness attributable to the ship or its officers, the libel must be dismissed.

THE LUDGATE HILL.

(District Court, S. D. New York. June 30, 1884.)

MARITIME LIEN—SUPPLIES—SHIP'S AGENTS—SECRET AGREEMENT WITH STEVEDORE.

A supply of rope necessary for use in unloading a ship, furnished to the ship by request of the ship's agents, binds the ship to pay for it. The ship's agents have presumptive authority to procure it on account of the ship. A secret agreement with a stevedore that he shall provide and pay for all such rope does not prevent a lien therefor in favor of one who furnishes such rope to the ship on her account, at the request of the ship's agents, when he has no knowledge or notice of such an agreement.

In Admiralty.

Beebe & Wilcox, for libellant.

Lorenzo Ullo, for claimant.

BROWN, J. The rope, on account of which this libel is filed, was necessary for the use of the ship in the discharge and unloading of her cargo under the stevedore. The evidence shows that it was so used. It comes under the head, therefore, of necessary supplies, and went to the use of the ship. By a private arrangement, not known to the libelants, the stevedore did the work for all the ships of the same line, at a specified price, furnishing his own rope. This, however, did not change the nature of the service to the ship, nor diminish her actual need of the stevedore's work, and of this rope as one of the appliances necessary for that work. The evidence leaves no doubt that the libelants refused to supply the rope to the stevedore personally; and in their dealings with Seagar Bros., the agents of the ship, they referred only to a supply of the rope to the ship. One of the libelants testifies that the cashier of the agents of the line told him that it was all right, and that the bill would be paid if Williams (the stevedore) signed it as correct. The rope was accordingly furnished, and charged to the ship. The bill was certified as correct by Williams, and was rendered to the ship's agents for payment, but was not paid. In a subsequent conversation, the cashier denied that he had promised payment; but his testimony has not been obtained on this trial. The statement in his subsequent conversation, when not under oath, cannot stand against the libelant's sworn statement, that payment was promised by him when the libelants first went to the office of the ship's agents; and the charge to the ship, the certifying of the bill by Williams, and the rendering of it to the agents, are all in agreement with the libelant's testimony, and tend to substantiate its truth. Various circumstances in the testimony show that the agents of the line had general authority to attend to the bills of the ship, and to the necessary business connected with loading and unloading; and this would embrace the procuring of any needed means for that purpose, including rope such as this. It is not an unusual thing for necessary supplies to be ordered by a ship's agents in a foreign port, and I have never known a lien refused for any want of authority on their part, where the supplies actually came to the use of the ship. *The Patapsco*, 13 Wall. 329. No question would have been made in this case, except for the private arrangement with Williams; but as that was not communicated to the libelants it cannot affect them. I think they are entitled to recover, therefore, on the ground that the rope was necessary in and about the work of unloading the ship, which was necessary to enable her to earn her freight; that it was furnished to the ship, and on her credit, and not to Williams, or on his credit; and that it was so furnished by authority of the agents of the ship, and on their promise to pay for it in behalf of the ship, and that their promise bound the ship as well as themselves.

Decree for the libelants for \$128.96, with interest from December 15, 1883, with costs.

REYNOLDS v. PALMER.

(Circuit Court, W. D. North Carolina. April Term, 1884.)

1. CONTRACT—ACTIONS IN CONTRACT AND TORT—JOINDER OF CAUSES.

Under the Code of North Carolina causes of action in tort and contract may be joined in the same case, provided they arise out of transactions connected with the same subject-matter, and affecting the same parties.

2. SAME—DECEIT IN BUSINESS TRANSACTIONS.

Deceit in business transactions consists in fraudulent representations or contrivances by which one man deceives another who has a right to rely upon representations, and has no means of detecting the fraud.

3. SAME—SALE OF GOODS—FRAUDULENT REPRESENTATIONS AS BASIS FOR SUIT AT LAW.

Fraudulent representations in the sale of goods will not of themselves constitute deceit, which will be the subject of a suit for damages. Mere "dealing talk," unless accompanied with some artifice to deceive the purchaser, or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not entitle one to an action.

4. SAME—NEGLECT OF PURCHASER TO INSPECT GOODS.

A party cannot be relieved by law, who, having every opportunity allowed him to inspect goods for himself, neglects to do so, but takes the goods at the estimate put on them by the seller.

5. SAME—SALE BY SAMPLE—IMPLIED WARRANTY.

To constitute a sale by sample with warranty implied, it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were so dealing with the quality of the bulk.

6. SAME—IMPLIED WARRANTY GENERALLY.

It is generally understood that in the sale or exchange of goods a warranty as to quality is not implied in law. The law presumes that a party who distrusts his own judgment and shrewdness will protect himself by requiring an express warranty.

7. SAME—"SOUND ORDER" IN CONTRACT FOR SALE OF TOBACCO.

The words "sound order," as applied in a contract relating to tobacco to be delivered to a manufacturer, means such order as would, with ordinary care, insure the sound condition of the tobacco at the time of its arrival at the place where it is to be manufactured, and for a reasonable time thereafter, until it could be used in the course of manufacture.

8. SAME—ONE PARTY CANNOT RESCIND CONTRACT IN PART.

A party entering into a contract for the purchase of goods to be sent in two consignments, cannot accept, pay for, and use the the first consignment, and refuse the second, and rescind the contract, without the consent of the seller.

9. SAME—WRITTEN CONTRACT PRESUMED TO EMBRACE PREVIOUS ORAL ONE.

It is a rule of law that all previous stipulations between parties to a transaction are presumed to be embraced in a subsequent written contract about the same subject-matter.

10. SAME—RIGHT OF ACTION NOT WAIVED BY ACCEPTANCE OF GOODS.

A party who accepts and uses a commodity, notwithstanding the fact of its being other than it was represented to be, does not thereby waive his right of action, but is entitled to recover for the breach of warranty the difference between the values of the goods in their damaged and undamaged condition.

At Law.

C. B. Watson, J. T. Morehead, and J. H. Dillard, for plaintiff.

John N. Staples and J. C. Buxton, for defendant.

DICK, J., (*charging jury*.) This is an important case to the parties on account of the amount of money involved. It is an interesting one to the persons who have heard the trial, as the evidence and the

legal questions presented are connected with the cultivation, curing, handling, the preparation for market, the sale, and manufacture of tobacco, a very important staple commodity in this section of country. The plaintiff brought this action to recover damages which he alleges he has sustained in a transaction in regard to the sale and delivery of a large crop of tobacco. In the pleadings he presents several causes of action. Under the flexible and liberal system of pleading and procedure adopted in the Code of this state, actions on *contract* and *tort* may be united in the same case, provided they arise out of transactions connected with the same subject-matter, and affect only the same parties.

The plaintiff alleges that he has sustained damages by reason of a deceit on the part of the defendants, in that the tobacco was "frost-bitten," and assurances were made to the contrary before the sale; that inferior grades of tobacco were designedly placed in the upper part of the barns, where they could not be easily seen, and fraudulent representations as to quality were made, well calculated to deceive. Deceit in business transactions consists in fraudulent representations or contrivances by which one man deceives another who has a right to rely upon representations, or has no means of detecting such fraud. Fraudulent representations in the sale of goods will not of themselves always constitute deceit which will be the subject of an action for damages. In cases like this, where parties deal with each other on a footing of equality, there must be some existing circumstances, or some means used, calculated to prevent the detection of falsehood or fraud, and impose upon a purchaser of ordinary prudence and circumspection. If a purchaser has full opportunity of examining the goods, and can easily and readily ascertain their quality and value by inspection, and he neglects to do so, then any injury which he may sustain by such negligence is the result of his own folly, and he can have no relief at law. The evidence on both sides shows that the plaintiff visited the barns before the sale, saw the tobacco, and, with some little inconvenience, could have made full examination, and no obstructions were placed in his way, and no objections were made by the agent of the defendant. A written contract was afterwards entered into by the parties, the terms of which had no reference to the representations made as to the quality or condition of the tobacco in previous negotiations. I am of opinion that this cause of action for deceit cannot be sustained, and the issue upon that subject is withdrawn from your further consideration.

The plaintiff further says that, when he visited the barns, he found the tobacco in three barns so much crowded and in such dry condition that he could not make an examination without serious injury to the commodity. He carefully inspected the tobacco on the lower tiers of the barns, and was assured by the agent that it fairly represented the quality of the whole crop, and trusting to such assurances he made no request for further examination. Under these circumstances, the plaintiff insists that the subsequent sale may be regarded

as a *sale by sample*, and that the law implies a warranty as to the quality of the entire crop. A sale by sample is where a small quantity of any commodity is exhibited by the vendor as a fair specimen of a larger quantity, called the bulk, which is not present, and there is no opportunity for a personal examination. To constitute such sale, it must appear that the parties contracted solely with reference to the sample, and mutually understood that they were so dealing in regard to the quality of the bulk. Such sales are commonly made when it is not convenient for the purchaser to see the bulk of the commodity, and one of the main reasons why the law implies a warranty is because there is not an opportunity for a personal examination of the article which the sample is shown to represent. It is conceded that, when the plaintiff proposed to purchase, the defendant offered him the means of reaching the barns, which were three miles distant, and told him that the agent would give him information and facilities for personal examination. A thorough examination was not made on account of the condition of the tobacco in the barns, as stated by the plaintiff in his testimony. At that time the tobacco was the property of the defendant, and any injury produced would have been his loss, and he made no objection to a full examination, and furnished facilities for such purpose. It is well established as a general principle that, on the sale or exchange of goods, a warranty as to the quality is not implied in law. There are some exceptions to this general rule, but it is unnecessary for me to refer to them, as the evidence does not bring this case within any of such exceptions. In most sales the law wisely and justly presumes that a purchaser will take care of his own interests, and that, when he distrusts his own shrewdness and judgment, he will protect himself from imposition by requiring an express warranty. In all cases where he has an opportunity of inspecting the goods, and fails to do so, he cannot properly complain if the goods do not come up to his own expectations, and the representations of the vendor. If an opportunity is afforded by the vendor, and an inspection is practicable, it must be made by the purchaser, no matter how disagreeable and inconvenient it may be. It is well known that, in the course of trade, vendors will speak in terms of high commendation of the commodities which they offer for sale. Such "dealing talk" is not regarded in law as fraudulent, unless accompanied with some artifice to deceive the purchaser and throw him off of his guard, or some concealment of intrinsic defects not easily discoverable by reasonable care and diligence. If a purchaser has an opportunity of seeing and examining for himself, he should rely upon his own judgment, and accept the consequences of mistake; or he should protect himself by express warranty.

As I am of opinion, from the evidence on both sides, that none of the elements of an implied warranty arise in this case, I will withdraw this issue from your further consideration. It is therefore unnecessary for me to consider the question presented in the argument

of counsel of defendant, whether the contract of sale subsequently made in writing and containing no warranty as to quality, and having an express warranty as to the condition of the tobacco at the time of delivery, can be enlarged or varied by parol evidence of previous declarations and circumstances. The general rule of law was correctly stated by counsel, that all previous stipulations between parties to a transaction are presumed to be embraced in a subsequent written contract about the subject-matter. There are some apparent exceptions to this rule, where it is manifest that it was not the intention of the parties to a written contract to include all the terms of a previous parol contract about the same subject-matter. Such questions, although learnedly discussed in the argument, are not now involved in the case, as they applied to the issue which I have withdrawn from your consideration.

The only issue submitted for your determination is whether there was a breach of the express warranty contained in the written contract between the parties as to the "sound order" of the tobacco at the time of delivery at Saltville, and, if there was such breach, what are the damages which the plaintiff is entitled to recover? The counsel of plaintiff, in the concluding argument, insists that the counsel of defendant, who preceded him, admitted that there was such a breach. I did not so understand the defendant's counsel. He only expressed an opinion as to the weight of evidence. That evidence you must weigh and consider for yourselves in determining the rights of parties. It is admitted that the tobacco was delivered in a reasonable time at Saltville to the railroad agent, and was duly shipped, and reached its destination at Winston in eight or ten days. There is no evidence as to the state of the weather during the transportation, or in what manner the tobacco was carried by the railroad company,—whether upon open platform or in closed box cars. There is some evidence tending to show that the hogsheads containing the tobacco exhibited no marks or appearances of injury by exposure to the weather. There is no warranty in the written contract as to the quality of the tobacco, and if the defendant delivered the tobacco as it was when purchased, and delivered it in *sound order*, then he complied with his agreement. If more of the tobacco was of an inferior quality than was expected by the plaintiff, and some of it was "frost-bitten," that would not constitute a breach of warranty, as that condition of things existed before the sale, and the plaintiff might have discovered such defects by careful examination.

The written contract of sale contains an express warranty as to the condition in which the tobacco was to be packed in hogsheads at the time of delivery at Saltville. It was to be in "sound order;" and we will now proceed to construe the meaning of that term as used by the parties. It is a fundamental rule that in the construction of contracts the courts may look not only at the language employed, but to the subject-matter and the surrounding circumstances,

and may avail themselves of the same lights which the parties possessed when the contract was made. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the nature of the subject-matter of a contract, and the sense in which parties may have used particular terms, but not to alter or modify the plain language which they have used. In construing the term "sound order," as used in the contract, we must ascertain the intention of the parties by considering their purposes and objects as manifested by the acts, declarations, and circumstances accompanying the transaction. The tobacco was purchased by the plaintiff for the purpose of manufacture at Winston, a place at considerable distance from the place of delivery. It was to be transported by railway, and the "working season" would be fully open by the first of May. The plaintiff gave instructions to pack, as soon as convenient, in "good, sound keeping order, so that the wrappers would not be broken." Under such circumstances, I think "sound order" means such order as would, with ordinary care, insure the sound condition of the tobacco on its arrival at Winston, and for a reasonable time thereafter, when it could be used in the course of manufacture. The warranty did not require the tobacco to be so packed as to remain sound for a long period, as long storage was not the purpose contemplated. With this construction of the contract, you will now proceed to consider the evidence upon the subject.

The witnesses of the defendant, who were engaged in the purchasing and delivery of the tobacco, states directly and positively that it was purchased and delivered *in good, sound keeping order* at Saltville, in accordance with the instructions of the plaintiff. The witnesses of the plaintiff did not see the tobacco when it was purchased and delivered, but they profess to be *experts* in the packing, shipping, and manufacturing of such articles, and have acquired their information and skill by long and large experience. They saw the tobacco soon after it reached Winston, and say positively that its damaged condition at that time was produced by negligence, ignorance, or a want of skill in packing in the hogsheads. You have before you the direct and positive testimony of the defendant's witnesses, and the well-considered opinions of the plaintiff's witnesses, founded upon knowledge acquired by long experience. You will therefore carefully weigh the direct testimony offered by the defendant, and the strong presumptive evidence presented by the plaintiff, and decide as to which preponderates in the scale of inquiry.

The evidence shows that there were two shipments of the tobacco: one on the seventh of April, 1882; the other on the twentieth of May, 1882. The contract price of the tobacco was 24 cents per pound, to be paid on delivery at Saltville. The price was not paid on delivery, but the defendants, by shipping before payment, waived this failure of compliance with the contract. The price of the first payment was paid by plaintiff before the tobacco arrived in Winston. There is no

representation as to the general quality of the tobacco in the contract; the express warranty only extends to the condition in which the tobacco was to be when delivered. The plaintiff, upon ascertaining the damaged condition of the tobacco, might have given notice to the defendant that he would not accept the same, but would hold as a security for the purchase money advanced. Such receiving and holding would not have been an acceptance. The plaintiff would have been a bailee holding under a lien, and would be required to exercise only ordinary care to prevent further damage. As the plaintiff accepted and used this first shipment of tobacco, he is only entitled to recover for the breach of the warranty the difference between the value of the tobacco in a sound condition in Saltville, and the value at Winston in its damaged condition. By accepting the tobacco he did not waive his right to sue for a breach of the warranty. He had paid for the tobacco and he had a right to "make the most of it,"—to secure himself as far as possible for the payments which he had made. As the contract of sale was an entire contract for the whole crop of defendant, and the first shipment was accepted, paid for, and used, the plaintiff had no right to refuse acceptance of the second shipment and rescind the contract without the consent of the defendant. If a contract is rescinded, it must be rescinded as to the whole subject-matter, and the parties placed in the condition they occupied before the contract became partly executed. When the second shipment was delivered to the railroad agent at Saltville, it became the property of the plaintiff, and he had no right to refuse its acceptance in Winston, although it was found to be in a damaged condition. If the tobacco was injured by the defective packing, the plaintiff's only remedy is an action for the damages sustained by a breach of warranty. He is liable to the defendant for the cost price which was not paid, and the defendant is liable to him by way of damages for the difference between the value of the tobacco sound and the tobacco injured. There is no direct evidence as to the value of the tobacco in sound condition at Saltville, as there was no market for such commodities at that place. The cost price agreed upon by the parties may well be considered as a *prima facie* standard of value. It may be that the plaintiff agreed to pay too much, or he may have obtained it at less than its real value. There is some evidence as to the value of such tobacco in the markets of the country, and you may thus ascertain its market value by deducting the cost of transportation to such place of sale. If you find that there was a breach of warranty as to soundness, then you will ascertain the value of tobacco when sound, deduct the value of the injured tobacco at Winston, then deduct the cost price of the second shipment, which was not paid, and render a verdict in favor of plaintiff for balance, if any.

The instructions which I have given you include the rights of the defendant as presented in his counter-claim. If the tobacco was in sound condition at the time of delivery at Saltville, he is entitled to

recover the balance of contract price, which is unpaid. He is in no way responsible for damages to the tobacco caused by exposure, or any other negligence of the railroad company in the course of transportation. He is only liable for damages caused by his own negligence, or want of skill in packing the tobacco in the hogsheads. You will consider the cause of action set forth by the plaintiff in his complaint, and the claim of the defendant set up in his counter-claim, and adjust and determine the controversy in accordance with the preponderance of the evidence, and the principles of law which the court has stated to you.

Verdict for plaintiff.

§ 1. WARRANTY DEFINED—EXPRESS AND IMPLIED. "A warranty," said Lord ABINGER, C. B., in *Chanter v. Hopkins*,¹ "is an express or implied statement of something which the party undertakes shall be a part of a contract; and, though part of the contract, yet collateral to the express object of it." The best definition of a warranty, said MARTIN, B., in *Stucley v. Baily*, is that given by Lord ABINGER in *Chanter v. Hopkins*; and the text writers have almost unanimously adopted the definition of the chief baron with the indorsement of Baron MARTIN. The frequent case of express warranties on the sale of goods and chattels—that the article is of a certain quality, of a certain quantity, of a certain kind—is beyond the scope of this note, which is confined to the cases where the law *implies* from the circumstances of the sale itself a warranty of quality, quantity, or title, as the case may be.

Implied warranties may be divided for convenience into the following:

- I. The implied warranty of identity or genuineness.
- II. The implied warranty on a sale of goods by description that the article is merchantable.
- III. The implied warranty on a sale by sample that the goods correspond to the sample.
- IV. The implied warranty that the goods shall be fit for the buyer's purpose.
- V. The implied warranty of title.
- VI. The implied warranty from custom.

§ 2. EXISTENCE OF ARTICLE NOT A WARRANTY, BUT AN ESSENTIAL ELEMENT OF THE CONTRACT. That the article sold actually exists is not an implied warranty, but is an essential element of the sale itself, without which there is no contract between the parties at all. Thus, in *Terry v. Bissell*,² the defendants sold the plaintiff a note, not then due, purporting to be signed by A. and indorsed by B. The signature of A. was genuine, but the indorsement by B. was a forgery. There was no express warranty of the genuineness of the indorsement, and neither party had any suspicion that it was forged. After the note had been protested for non-payment, the plaintiff discovered the fact of the forgery, and immediately offered to return the note to the defendants, and demanded the money paid for it. The defendants refusing to receive the note or refund the money, he brought an action of *assumpsit* for money had and received. It was held that he was entitled to recover. "In the first place," said ELLSWORTH, J., "there was no sale, because

¹ 4 Mees. & W. 404.

² 23 Conn. 23.

the subject-matter of the sale had no existence." There must be, in order to make a valid contract, a thing sold. If, ignorant of the death of my horse, I sell it, there is no sale, for want of a thing sold. If A. and B., being together in New York, A. sells B. his house in Chicago, both being ignorant that it has been burned down, the contract is null, for there is nothing to contract about.¹ "I have often ruled," said Lord KENYON in *Farrar v. Nightingale*,² "that where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one,—as, for example, if it was for a lesser number of years than he had contracted to sell,—the buyer may consider the contract as at an end, and bring an action for money had and received, to recover back any sum of money he may have paid." There are intimations to be found occasionally to the effect that there is an implied warranty of the existence of the thing sold; but this is a mistaken idea, as a proper conception of the contract of sale will show, and as the cases just referred to sufficiently demonstrate.

§ 3. IDENTITY OF GOODS—NOT A WARRANTY. The same is true of the matter of the identity of the goods. "If a man," said Lord ABINGER in *Chanter v. Hopkins*,³ "if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it. So, if a man were to order copper for sheathing ships, that is a particular copper, prepared in a particular manner; if the seller sells him a different sort, in that case he does not comply with the contract; and though this may have been considered a warranty, and may have ranged under the class of cases relating to warranties, yet it is not properly so." And in *Terry v. Bissell*,⁴ ELLSWORTH, J., said: "Suppose the defendant had proposed to sell and had sold a bar of metal as gold which turned out to be mere dross, colored and disguised, without a particle of gold; or a barrel of flour, which was examined on the surface, but below was mere sawdust or gravel; or a barrel of beef, which turned out to have one layer of beef and the rest was brickbats and stones; or a box of chisels, which turned out to be scrap-iron,—would the seller be permitted to insist that it was a sale, and keep his money?"

§ 4. THE GENERAL RULE ON A SALE IS CAVEAT EMPTOR. Centuries ago, Fitzherbert⁵ laid down the common law of buying and selling thus: "If a man do sell unto another man a horse, and warrant him to be sound and good, etc., if the horse be lame or diseased that he cannot walk, he shall have an action on the case against him. And so, if a man bargain and sell with another certain pipes of wine and warrant them to be good, etc., and they are corrupted, he shall have an action on the case against him. But note, it behoveth that he warrant it to be good, and the horse to be sound, otherwise the action will not lie; for if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in the case." This is the doctrine of *caveat emptor*—let the purchaser take heed. Under this rule, where the sale of a chattel takes place which has been or might have been inspected by the buyer at the sale, there is no implied warranty on the part of the seller as to the quality or condition of the thing sold, but all risks as to them fall upon the buyer. This rule is well established in England, and in the courts of all the states, with a single exception.⁶ And

¹ Poth. Cont. 4.

² 2 Esp. 639.

³ Ante.

⁴ Supra.

⁵ Nat. Br. 213.

⁶ Jones v. Just, L. R. 3 Q. B. 202; Chandler v. Lofus, Cro. Jac. 4; Parkinson v.

Lee, 2 East, 314; Springwell v. Allen, Aleyn, 91; Hopkins v. Tanqueray, 15 C. B. 130; Hall v. Condor, 2 C. B. (N. S.) 22; Ormrod v. Huth, 14 Mees. & W. 664; Burnbey v. Bollett, 16 Mees. & W. 684; Mixer v. Coburn, 11 Metc. 559; Windsor v. Lombard, 18 Pick. 60; Barnard v. Kel-

the fact that the merchandise is packed up, is no excuse for the purchaser not examining it. That paint was sold in kegs;¹ that crockery was sold in crates;² that flour was sold in barrels;³ that hemp was sold in bales;⁴ that tobacco was sold in kegs;⁵ that molasses was sold in barrels,⁶—was held in each case to be no reason why the purchaser should not have examined them. In the latter case the court say: "If it should be held a sufficient excuse for the neglect to make the examination that the molasses was in barrels, such an excuse would be equally available in all cases where the article sold is in any kind of inclosure, however readily the vessels or envelopes might be opened. In fact, it would be available in almost every case where the purchaser should not choose to examine the goods he is contracting for."

§ 5. WARRANTY ON SALE OF GOODS BY DESCRIPTION THAT THEY ARE MERCHANTABLE—THE PRINCIPLE STATED. "If a man sells an article," says BEST, C. J., in *Jones v. Bright*,⁷ "he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose he thereby warrants it to be fit for that purpose, and no case has been decided otherwise, although there are, doubtless, some *dicta* to the contrary."

"Under such circumstances," said Lord ELLENBOROUGH in *Gardiner v. Gray*,⁸ "(the sale of goods as 'waste silk,') the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty this is an implied term in every such contract. Where there is no opportunity to inspect the commodity the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

In *McClung v. Kelly*⁹ it was said: "The contract always carries with it an obligation that the article shall be merchantable; at least, not to have any remarkable defect."

In *Gaylord Manuf'g Co. v. Allen*¹⁰ it was said: "A contract to manufacture and deliver an article at a future day carries with it an obligation that the article shall be merchantable; or, if sold for a particular purpose, that it shall be suitable and proper for such purpose."

In *Edwards v. Hathaway*,¹¹ SHARSWOOD, J., said: "The general rule at law is that, upon the sale of any article of merchandise, the seller does not become responsible for the quality of the article sold, unless he either expressly warranted the quality, or made a false and fraudulent representation in regard to it. This rule, however, is subject to some reasonable exceptions. It does not apply where the purchaser has no opportunity of inspecting the article.

* * * I take it the same modification of the general rule applies when a coal dealer gives an order to the agent for coal to be sent to him from the mine; it is an implied term of the contract that the coal shall be of a merchant-

logg, 10 Wall. 383; Salem Rubber Co. v. Adams, 23 Pick. 256; Bryant v. Pender, 45 Vt. 487; Holden v. Daken, 4 Johns. 421; Carley v. Wilkens, 6 Barb. 557; Seixas v. Woods, 2 Caines, 48; Moses v. Mead, 1 Denio, 378; Wilbur v. Cartwright, 44 Barb. 536; Dean v. Mason, 4 Conn. 428; Frazier v. Harvey, 34 Conn. 469; Hahn v. Doolittle, 18 Wis. 196; Westmorland v. Dixon, 4 Hayw. (Tenn.) 233; Otts v. Alderson, 10 Smedes & M. 473; Tewksbury v. Bennett, 31 Iowa, 83; Hadley v. Clinton, 13 Ohio St. 502; Irving v. Thomas, 18 Me. 418; Johnston v. Cope, 3 Har. & J. 89. Contra,

Timrod v. Shoolbred, 1 Bay, 324; Barnard v. Yates, 1 Nott & McC. 142, where caveat venditor is the rule.

¹ Holden v. Dakin, 4 Johns. 421.

² Thompson v. Ashton, 14 Johns. 316.

³ Hart v. Wright, 17 Wend. 267.

⁴ Salisbury v. Stainer, 19 Wend. 159.

⁵ Hyatt v. Boyle, 5 Gill & J. 110.

⁶ Humphreys v. Comline, 8 Blackf. 516.

⁷ 5 Bing. 544.

⁸ 4 Camp. 144.

⁹ 21 Iowa, 509.

¹⁰ 53 N. Y. 513.

¹¹ 1 Phila. 547.

able character. It would not be allowed in such a case that the seller should, in compliance with such an order, send an article which, though it might still pass muster by the name of coal, was composed of one-half slate or stone. It would be different if a man went into a coal-yard and purchased a quantity of coal there lying. His eyes in such a case are his market, and if he distrusts his own judgment he should take the opinion of those who are acquainted with the article, or require the seller to warrant. But a man's eyes are of no use to him when he is buying something in the bowels of the earth fifty or a hundred miles distant."

In *Rodgers v. Niles*,¹ SCOTT, J., said: "It must be clear that the rule of *caveat emptor* can apply in no such case, whether the contract be made with a manufacturer or other person; for the person can exercise no judgment in regard to the quality of a thing not *in esse*, or which is undeterminate, and to be thereafter selected or procured by the exercise of the vendor's sole judgment, discretion, and will. Any rule must be unreasonable which would impute to a purchaser an intention to rely on his own judgment as to the quality of an article where the circumstances of the case render it simply impossible for him to exercise any judgment whatever."

§ 6. SAME—THE CASES REVIEWED. There was a contract for the sale of 12 bales of waste silk imported from the continent into England. Before it was landed, samples were shown to the plaintiff's agent, and the bargain was then made, but without reference to the samples. It was purchased in London and sent to Manchester, and on its arrival there was found to be of a quality not salable under the denomination of "waste silk." It was held that there was an implied warranty that the article was salable, and the plaintiff had a verdict.²

A firm of Liverpool merchants agreed to buy from the defendant, a London merchant, a quantity of Manilla hemp, to arrive from Singapore by certain ships. The ships arrived, and the hemp was delivered to the plaintiffs and paid for, but on examination of the bales it was found that they had been wetted through with salt water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to lose its character of hemp, but it was not merchantable. The defendant did not know of the state in which the hemp had been shipped at Singapore. The Liverpool merchants sold the hemp at auction as "Manilla hemp, with all faults," and it realized 75 per cent. of the price which similar hemp would have brought if undamaged. In an action by the Liverpool merchants it was held that there was an implied warranty on the part of the defendant to supply Manilla hemp of the particular quality of which the bales consisted, in a merchantable condition; and that the plaintiffs were entitled as damages to the difference between what the hemp was worth when it arrived, and what the same hemp would have realized had it been shipped in a state in which it had ought to have been shipped.³

E. was the proprietor of a coal mine in the country, and his agent sold to H. 55 tons of coal to be taken from E.'s mine. The coal arrived, but was found to be composed to a considerable extent of slate and stone. It was held that there was an implied warranty on the part of the seller that the coal should be good merchantable coal.⁴

A contract was for "Calcutta linseed." JERVIS, C. J., told the jury that the question for them to consider was "whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract." CRESSWELL, J., said "they were to say whether the article delivered reasonably

¹ 11 Ohio St. 55.

² *Gardiner v. Grey*, 4 Camp. 144.

³ *Jones v. Just*, L. R. 3 Q. B. 197.

⁴ *Edwards v. Hathaway*, 1 Phila. 547, and see *Spurr v. Albert Mining Co.* 2 Han-
nay, (N. B.) 361.

answered the description of Calcutta linseed." CROWDER, J., said "the jury in effect found that the article delivered did not reasonably answer the description in the contract." And WILLES, J., added: "The purchaser had a right to expect, not a perfect article, but an article which would be salable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for."¹

In another case the contract was for "foreign refined rape oil, warranted equal to samples." The oil offered was equal to samples, but both the samples and the oil offered were adulterated. PARKE, B., told the jury that "the statement in the sold note as to the samples related to the quality only of the article, and that, according to the contract, the defendant was entitled to have rape oil delivered to him." PLATT, B., on appeal, said: "I understand that the oil to be delivered was to be equal to the samples in quality. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not being foreign refined rape oil at all. And the learned judge told the jury that if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape oil, the plaintiff would have been entitled to succeed; but the question was put to the jury, and they were of the opinion that it was not known as such." And PARKE, B., added: "The evidence went to show that the oil offered did not answer the description of the article sold."²

In another case the article sold was "oxalic acid." ERLE, C. J., told the jury that "the defendant could only fulfill his part of the contract by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid; and that, if they should be of opinion that the article delivered by the defendant as oxalic acid did not properly fulfill that description, they should find for the plaintiff."

In another case the plaintiffs ordered of the defendants, who were saddle manufacturers in another city, 50 saddles, to be delivered at a wharf in London, to be shipped to Prince Edward's island. The saddles were sent and shipped without the plaintiffs having an opportunity to see them. Upon their arrival at Prince Edward's island, they were found to be very inferior saddles and quite unsalable without being restuffed and relined. It was held that there was an implied undertaking that the saddles were merchantable, and the plaintiffs had a verdict.³

§ 7. WARRANTY ON SALE OF GOODS FOR SPECIFIED PURPOSE—THE PRINCIPLE STATED. "If a man," said BEST, C. J., in *Jones v. Bright*,⁴ "sells an article, he thereby warrants that it is merchantable; that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose. * * * Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. * * * The law then resolves into this: that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

In *Gray v. Cox*,⁵ ABBOTT, C. J., said: "If a person sells a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose."

In *Brown v. Edgington*,⁶ TINDAL, C. J., said: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchase an article upon his own judgment, he cannot afterwards hold the vendor

¹ *Wieler v. Schilizzi*, 17 C. B. 619.

² *Nichol v. Godts*, 10 Esp. 191.

³ *Laing v. Fidgeon*, 4 Camp. 169.

⁴ 5 Bing. 533.

⁵ 4 Barn. & C. 108.

⁶ 2 Maule & S. 279.

responsible, on the ground that the article turns out unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it is designed."

In *Randall v. Newson*,¹ BRETT, L. J., said: "In some contracts, the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us it is either assumed or expressly stated that the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must therefore first determine, from the words used or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description; that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in the words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not, in fact, answer the description of it in the contract, it does not do so, more or less, because the defect in it is patent or latent or discoverable. And, accordingly, there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale."

In *Gerst v. Jones*,² STAPLES, J., said: "The maxim *caveat emptor* applies in the absence of fraud or express warranty. Several modifications of this rule have, however, been recognized by the courts, perhaps as well established as the rule itself. One of these is that upon an executory contract of sale, where goods are ordered for a particular use or purpose known to the seller, the latter impliedly undertakes they shall be reasonably fit for the use or purpose for which they are intended. Such a case, according to the authorities, is plainly distinguishable from that of an executed sale of a specific chattel selected by the purchaser upon which no implied warranty arises. The distinction seems to be somewhat refined and technical at first view, but it is founded in sound reason and is sustained by the authorities. Where the purchase is of a defined, ascertained article, the vendor performs his part of the contract by sending the article, and, in the absence of fraud or some positive affirmation amounting to a warranty, he is not liable for any defect in the quality. The purchaser in selecting the particular article relies upon his own judgment, and takes upon himself the risk of its answering his purposes. If he desires to secure himself against loss, he ought to require an express warranty. In the absence of such warranty the rule of *caveat emptor* must govern. Where, however, the purchaser does not designate any specific article, but orders goods of a particular quality or for a particular purpose, and that purpose is known to the seller, the presumption is the purchaser relies upon the judgment of the seller, and the latter, by undertaking to furnish the goods, impliedly undertakes they shall be reasonably fit for the purpose for which they are intended, and he will be answerable for any defect in the material or in the construction by which the value is diminished. This rule applies with peculiar force where the seller is the manufacturer."

¹ L. R. 2 Q. B. Div. 102.

² 32 Grat. 521.

§ 8. SAME—THE CASES REVIEWED. The plaintiff ordered and bought of the defendant, a coach-builder, a pole for his carriage. The pole broke in use, and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but the defendant had not been guilty of any negligence. It was held that the plaintiff was entitled to recover for the value of the pole and the injury to the horses, the court laying down the principle that, on the sale of an article for a specific purpose, there is a warranty by the vendor that it is reasonably fit for that purpose, and that this warranty extends to latent, undiscoverable defects. "It is to be taken," said BRETT, J., "although nothing specific seems to have been said, that the order given and accepted was not merely for a pole in general, but for the supply of a pole for the plaintiff's carriage; and that the contract, therefore, was for the purchase and sale or supply of an article for a specific purpose. In other words, the subject-matter of the contract was not merely a pole, but a pole for the purchaser's carriage; or, to state the proposition in an equivalent form, the thing which would, if the contract was formally drawn up, be described in it as the subject-matter of it, was not merely a pole generally, but a pole to be purchased for a specific purpose; namely, to be used in the plaintiff's carriage. The question is, what, in such a contract, is the implied undertaking as to the sufficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect,—limited to defects which might be discovered by care and skill?" The court, as we have seen, decided this question in favor of the plaintiff's contention.¹

In another case the plaintiffs had agreed to carry certain troops from England to Bombay for the East India Company, and the defendants entered into a contract with the plaintiffs to supply them with provisions, (troop stores,) "guaranteed to pass survey of the East India officers." It was held that this express warranty did not exclude the implied warranty that the stores should be fit for the purpose for which they were intended; and that, the provisions being unsound and unwholesome, the defendants were liable. "Where a buyer," said COCKBURN, J., "buys a specific article, the maxim *caveat emptor* applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions."² This case was followed in *Beer v. Walker*.³ Here a wholesale provision dealer in London contracted with a retail merchant at Brighton to send him weekly a certain quantity of rabbits. It was held that in this contract there was an implied warranty by the wholesale dealer that the rabbits should be fit for human food when, in the ordinary course of transit, they should reach the retail dealer at Brighton, and until he had had a reasonable opportunity of disposing of them to his customers.

In a New York case the plaintiffs were manufacturers of steel in Pennsylvania; the defendants, who were known as the "Morris Ax & Tool Company," were manufacturers of axes in New York. The plaintiffs sold to the defendants 10 tons of steel. It was held that there was an implied warranty that the steel was of the kind fit for axes, and that the defendant's name was notice to the sellers of the use to which the steel was to be applied. Said MULLEN, P. J.: "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. The plaintiffs were manufacturers, and the defendants ordered the steel for the purpose of being made into axes."⁴

¹ *Randall v. Neuson*, L. R. 2 Q. B. Div. 102.

² *Bigge v. Parkinson*, 7 Hurl. & N. 955.

³ 46 L. J. C. P. 677.

⁴ *Park v. Morris Axe Co.* 4 Lans. 103.

In another New York case the plaintiff was a dealer in lamp-black; the defendant, a manufacturer of printer's ink. The plaintiff sold several barrels of lamp-black to the defendant, the latter saying that he must be very particular in having black that would make printer's ink; that black for carriage use would not do. The barrels were not examined. It was held that there was an implied warranty that the black should be suitable for the manufacture of printer's ink.¹

The plaintiff bought a quantity of hay of the defendant in his barn, but did not examine it, saying that he could not tell by that, but he wanted hay for his oxen during spring and summer. The defendant replied that it was good hay, cut round the barn. When the plaintiff came to receive the hay he found it worthless, and not such hay as grew around the barn. It was held that he could recover on the implied warranty. "The hay," said the court, "was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay, then, for this particular use, ordinarily implies a certainty that it is fit for this use."²

Jones & Co. were manufacturers of tobacco, and Gerst was a manufacturer of tobacco boxes. It is well known in the trade that boxes for packing tobacco in must be made of dry and seasoned wood, otherwise the tobacco will mould and become damaged. Gerst agreed to furnish Jones & Co. during the season of 1876 as many boxes as the latter would use in their business at a certain price, and under this agreement did supply a great many, into which Jones & Co. packed their tobacco and shipped it. But much of this moulded in consequence of the boxes being made of green timber. It was held that Gerst was liable on an implied warranty that the boxes should be fit for the purpose of packing tobacco. "The defendant," said the court, "in undertaking to furnish the boxes impliedly agreed that they should be reasonably fit for that purpose. Had the plaintiffs gone to the defendant's factory and themselves selected certain boxes such as they believed would answer their purposes, it is very clear the defendant would not be liable, however worthless the boxes might be, because the plaintiffs in that case must have relied on their own skill and judgment exclusively. But the plaintiffs made no selection; they left that to the defendant; they relied upon his skill and judgment as a manufacturer to furnish an article suited to the business in which they were engaged. * * * It is no answer to say that here the defendant was ignorant of the defect in the boxes, and that he used every proper precaution to guard against it. Neither the ignorance of the seller nor the exercise of care and diligence on his part can exempt him from liability, where there is a warranty, whether it be express or implied."³

So, where a contract was to "furnish a steam-boiler suitable to the engine," it was held that there was a warranty that it was suitable for the purpose named.⁴

§ 9. SAME--NO WARRANTY OF KNOWN AND DEFINED ARTICLE. The cases just cited are to be distinguished from those in which a known, described, and defined article is ordered, and the purchaser gets what he has ordered. Here there is no warranty that the goods will answer the particular purpose for

¹ Murray v. Smith, 4 Daly, 277.

² Beals v. Olmstead, 24 Vt. 114; and see French v. Vining, 102 Mass. 132.

³ Gerst v. Jones, 32 Grat. 524.

⁴ Street v. Chapman, 29 Ind. 142; and see Wilson v. Dunville, L. R. 4 Ir. Rep. 249; Robertson v. Amazon Tug Co. L. R. 7 Q. B. Div. 598; Smith v. Baker, 40 L. J. (N. S.) 261; Macfarlane v. Taylor, L. R. 1 Sc. App. 245; Snelgrove v. Bruce, 18 U. C. C. P. 561; Baker v. Lyman, 38 U. C. Q. B. 498; Big-

elow v. Boxall, 38 U. C. Q. B. 452; Howard v. Hoey, 23 Wend. 350; Van Wycke v. Allen, 69 N. Y. 61; White v. Miller, 71 N. Y. 118; Hanger v. Evans, 38 Ark. 334; Wolcott v. Mount, 38 N. J. Law, 496; Taylor v. Cole, 111 Mass. 363; Merrill v. Nightingale, 39 Wis. 247; Robson v. Miller, 12 S. C. 586; Gerst v. Jones, 32 Grat. 518; Gammell v. Gunby, 52 Ga. 504; Wilcox v. Owens, 64 Ga. 601.

which they are purchased. The case of *Chanter v. Hopkins*¹ is probably the leading authority on this distinction. Here the defendant, a brewer, sent to the plaintiff, who was the inventor and manufacturer of a furnace known as "Chanter's Smoke-consuming Furnace," the following order: "Send me your patent hopper and apparatus to fit up my brewery copper with your smoke-consuming furnace." The plaintiff did so, the furnace was set up, but it turned out to be of no use for the purposes of a brewery. It was held that there was no implied warranty that it was suitable for such a purpose. "In the present case," said Lord ABINGER, "the question is whether or no the order has not been complied with in its terms. What is the order? It is an order for one of those engines of which the plaintiff was known to be the patentee. He was not obliged to know the object or use to which the defendant meant to apply it, and it is admitted there is no fraud. If, when the plaintiff received such an order, he had known it could not be so applied, and felt that the defendant was under some misapprehension on the subject, and that he was buying a thing on the supposition that he could apply it to that use, when the plaintiff very well knew he could not, in that case it might affect the contract on the ground of the suppression of a material fact. Or, if the terms of the contract were proposed by the plaintiff himself, such as, 'I will send you one of my smoke-consuming furnaces which will suit your brewery,' in such a case that would be a warranty that it would suit a brewery. But in this case no fraud whatever is suggested, and the case is that of an order for the purchase of a specific chattel which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but if it does not, he is not the less on that account bound to pay for it. The seller does not know it will not suit his purpose, and the contract is complied with in its terms. It appears to me that this is the ordinary case of a man who has had the misfortune to order a particular chattel on the supposition that it will answer a particular purpose, but he finds it will not." And PARKE, B., puts this illustration: "Suppose," says he, "a party offered to sell me a horse of such a description as would suit my carriage, he could not fix on me a liability to pay for it, unless it were a horse fit for the purpose it was wanted for; but if I describe it as a particular bay horse, in that case the contract is performed by his sending that horse; and it appears to me the present is a similar case. * * * The purchase is of a defined and well-known machine. The plaintiff has performed his part of the contract by sending that machine, and it is the defendant's concern whether it answers the purpose for which he wanted to use it or not. As I read the contract, all the plaintiff has to do is to send his patent machine, and whether it answers the purpose of the defendant or not, with that the plaintiff has nothing to do; he has furnished the machine contracted for, and he is entitled on that contract to recover the stipulated price."

In *Ollivant v. Bayley*² the plaintiff was the owner and manufacturer of a patent machine for printing in two colors. The defendant looked at the machine on the plaintiff's premises, and ordered one, plaintiff undertaking in writing to make him "a two-color printing machine on my patent principle." The machine was made and delivered, but the defendant refused to pay for it on the ground that it had been found useless for printing in two colors. The jury were told that if the machine described was a known, ascertained article ordered by the defendant he was liable, whether it answered his purpose or not; but that if it was not a known, ascertained article, and defendant had merely ordered and plaintiff agreed to supply a machine for printing two colors, the defendant was not liable unless it would do so. The plaintiff had a verdict, which was sustained on appeal, where, the defendant's counsel arguing that the contract was to be construed as requiring an instrument

¹ 4 Mees. & W. 399.² 5 Q. B. 288.

which should be reasonably fit for printing in two colors, WIGHTMAN, J., answered: "You contend that if the principle is not really adapted to the purpose he must send something not according to the principle."

In *Port Carbon Iron Co. v. Groves*¹ the contract was for 10 tons of "A No. 1 pig-iron." The defendant purchased it for castings, but it turned out to be not at all the kind of iron for that purpose. It was held that there was no warranty that the thing was fit for that purpose. "If a thing be ordered of the manufacturer for a special purpose," said the court, "and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose."

In another case the defendant sold the plaintiff 150 barrels of an article manufactured by him, called "Chappell's Fertilizer," to be used on his land. The stuff turned out to be of little use for fertilizing purposes, nevertheless it was held that no action would lie,—there was no warranty, because it was the sale of a specific, ascertained, and defined article. "If the plaintiff," said the court, "relying on the defendant's skill and judgment, had applied to him to furnish a manure which would produce the effect attributed to Chappell's fertilizer, without specifying what particular kind of manure he wanted, and the defendant had accordingly furnished an article which proved to be entirely worthless, there would be good ground for imputing an implied warranty."² Thus, where a person contracted at a price agreed to take all the wheat A. might raise on his farm, it was held that there was no implied warranty as to the quality of the wheat.³

§ 10. SAME—RULE THE SAME WHETHER VENDOR BE MANUFACTURER OR NOT. In *Brown v. Edgington*⁴ the plaintiff sent to the defendant's shop—the defendant was a dealer in ropes—to purchase a crane rope, telling him it was wanted for the purpose of raising pipes of wine from a cellar. The defendant, not having a rope of the proper thickness, undertook to have one made, and sent his servant to the plaintiff's premises to take the measure, and afterwards to fix the rope. A short time afterwards, while some of the plaintiff's servants were hauling up a cask of wine, the rope broke, the barrel was stove in, and the wine lost. It was held that there was an implied warranty that the rope should be fit for the purpose for which it was required, and the defendant was held liable; and that the rule was not limited to cases where the vendor was also the manufacturer of the vehicle, but extended to all cases where the buyer relied upon the skill and judgment of the seller.⁵

§ 11. VENDOR'S SKILL NOT RELIED ON—NO WARRANTY. In the case of an implied warranty that an article is fit for the purpose for which it is intended, it is generally required, in order to raise such implied warranty, that the vendor's skill should be relied on by the purchaser. Therefore, the converse of this rule has been established, viz.: that when the skill of the vendor is not relied upon by the vendee, there is no implied warranty of fitness. *Dounce v. Dow*⁶ is usually referred to as an authority on this principle, or better, perhaps, as an exception to the general rule. In this case the defendants ordered of the plaintiff, who was a dealer in iron, 10 tons of "XX pipe iron," to be used in the manufacture of castings for farming instruments, which required soft, tough iron. The plaintiff furnished the iron of the brand specified, but when used by defendants was found not to answer the purpose, being hard and brittle. It was held that the said warranty by plain-

¹ 68 Pa. St. 149.

² *Mason v. Chappell*, 15 Grat. 572.

³ *Davis v. Murphy*, 14 Ind. 150; and see *Shepherd v. Pybus*, 4 Scott, N. R. 449.

⁴ 2 Scott, N. R. 496.

⁵ And see *Bigge v. Parkinson*, 7 H. & N. 955.

⁶ 6 Thomp. & C. 653; 64 N. Y. 411.

tiff was that the iron was "XX pipe iron," and that there was no warranty that it was fit for the manufacture of farming implements, because the defendants had not relied on the plaintiff's judgment, but had considered for themselves that the iron in question was fit for the purpose. It would appear that this case might have been determined in the same way on another ground, viz., that the defendants had ordered a specific, defined article which the plaintiffs had furnished.¹

§ 12. WARRANTY BY MANUFACTURER THAT ARTICLE IS FREE FROM LATENT DEFECT. It has been held in New York that the implied warranty that a manufactured article sold by the manufacturer is free from any latent defect is restricted to such defects as grow out of the process of manufacture, and do not extend to defects in the materials employed.² On the other hand, in Ohio a contrary doctrine has been announced. In *Rodgers v. Niles*,³ N. & Co. agreed with R. & Co. to manufacture and deliver to the latter three steam-boilers to run their engines in their boiler-mills, for which R. & Co. agreed to pay a specified price. It was held to be an implied stipulation of the contract that the boilers should be free from all such defects of material and workmanship, whether latent or otherwise, as would render them unfit for the usual purposes of such boilers.⁴

§ 13. IMPLIED WARRANTY ON SALE OF PROVISIONS—THE ENGLISH RULE. Whether on the sale of provisions there is an implied warranty that the articles are fit for food, is a question upon which there is much difference of opinion, and on which the authorities are far from being harmonious. Blackstone says that it is a sound and elementary principle that in a contract for the sale of provisions it is implied that they are wholesome, and if they be not, an action on the case for deceit lies against the vendor.⁵

In *Burnby v. Bollett*⁶ the question was examined in the most thorough manner by Baron PARKE, in the court of exchequer. A., a farmer, bought in the public market from B., a butcher, the carcass of a pig for domestic consumption, leaving it hanging at the stall till he could remove it. Afterwards, C., wanting a pig, bought A.'s from him. The pig was diseased and unfit for food, but none of them knew it, nor was there a warranty given by any one. The court held that there was no implied warranty that the pig was fit for food from A. to C. "On the part of the plaintiff," said PARKE, B., "the argument was that the sale of victuals to be used for man's consumption differed from the sale of other commodities, and that the vendor of such, without fraud, would be liable to the vendee on an implied warranty. This position is apparently laid down in Keilway, 91; but the authorities there referred to in the Year Books (9 Hen. VI. 53b, and 11 Edw. IV. 6b, and others,) when well considered, lead rather to the conclusion that there is no other difference between the sale of food for man and other articles than this, viz.: that victualers and common dealers in victuals are not merely in the situation of common dealers in other commodities, nor are they liable under the same circumstance as they are; as, if an order be sent to them to be executed, they are to be presumed to undertake the supply of food and wholesome meat, and they are likewise punishable as a common nuisance for selling corrupt meat, by virtue of an ancient statute; and this, certainly, if they knew the fact, and probably if they do not. Such persons are, therefore,

¹ *Emmertson v. Matthews*, 7 Hurl. & N. 586; *Palmer's Appeal*, 96 Pa. St. 106; *Matthews v. Hartson*, 3 Pittsb. 86; *Robertson v. Amazon Tug Co.* L. R. 7 Q. B. Div. 598.

² *Hoe v. Sanborn*, 21 N. Y. 552.

³ 11 Ohio St. 48.

⁴ *Hoe v. Sanborn* was distinguished v. 21 F. no. 7—29

from this case on the ground that the latter was an executed sale, while the former was an executory contract.

⁵ 3 Bl. Com. 166. This view is criticised by Benjamin in his work on Sales, (p. 875,) and defended by Chitty in his work on Contracts, (p. 419.)

⁶ 16 Mees. & W. 644.

civily responsible to those customers to whom they sell such victuals, for any special particular injury, by the breach of the law which is thereby committed. Lord COKE lays it down that all persons, as well as common dealers, are liable criminally for selling corrupt meat; for, by the statute 51 Hen. III., and by the statute made in the reign of Edw. I., it is ordained that none shall sell corrupt victuals, and the statute of 51 Hen. VII. says that the pillory and tumbrel and assize of bread and ale applies only to vintners, brewers, butchers, and victualers. * * * It is said in the Year Book (9 Hen. VI. 53) that the warranty is not to the purpose, for it is ordained that none shall sell corrupt victuals; and in *Roswell v. Vaughan*,¹ where TANFIELD, C. B., and ALTHAM, B., say that 'if a man sells victuals which is corrupt, without warranty, an action lies because it is against the commonwealth.' This, also, explains the note of Lord HALE in 1 Fitz. Nat. Br. 94, that there is diversity between selling corrupt wines and merchandise, for then an action on the case does lie without warranty; otherwise, if it be for a taverner or victualer, if it prejudice any. The defendant in this case was not dealing in the way of a common trader, and was not punishable by indictment for what he did." This ruling was followed and approved in *Emmerton v. Matthews*² and *Smith v. Baker*,³ from which cases it is clear that the English rule is that (at common law) there is no implied warranty that provisions sold are sound or fit for food.

§ 14. SAME—THE RULE IN THE UNITED STATES. The weight of authority in the United States seems to establish a rule similar to that of the English courts. A qualification, however, not made in the older country finds support in several of the states. In the early case of *Bailey v. Nichols*,⁴ decided in Connecticut in 1796, it was laid down that "the defendant, by selling his beef for cargo beef, and asking and receiving a sound price for it, did warrant it to be such as the law prescribed under the denomination of cargo beef, and that it was good and sound." It will be observed, however, that this case went on the doctrine of a sound price guarantying a sound article,—a doctrine subsequently overruled by the same court.⁵ In *Emerson v. Brigham*,⁶ a leading case on this point, SEWALL, J., said:

"Now there are cases in which a representation willfully false is to be presumed from the circumstances of the transaction and of the parties, when it is not required to be otherwise or directly proved. In this way, perhaps, what was cited from Blackstone's Commentaries, and relied on for the plaintiff in the argument of the case at bar, may be reconciled with the general doctrine as I have stated it; and so, likewise, many decisions which seem at first sight to indicate another rule, will be found within the general doctrine exemplified by Justice POPHAM; at least, in the intended application of it. Justice BLACK-

¹ Cro. Jac. 193.

² 7 Hurl. & N. 586.

³ 40 Law T. (N. S.) 261.

⁴ 2 Root, 407.

⁵ In *Dean v. Mason*, 4 Conn. 428, (1822.) In this case it was said: "The implied warranty contended for is founded on the presumed fact that an adequate price was given for the skins, admitting them to be good, and on the inference that this amounts to a warranty of the articles sold as being sound and merchantable. * * * The notion that a high or sound price is tantamount to a warranty has been long exploded. In *Parkinson v. Lee*, 2 East, 314, it was adjudged that no warranty was implied from the fullness of the consideration; and that if the seller sells the thing as he believes it to be, without fraud, the

law will not imply that he sold it on any other terms than those expressed. And it is an established rule that in order to enable a vendee to maintain an action against the vendor, there must be either fraud or an express warranty. *Holden v. Dakin*, 4 Johns. 421; *Sands v. Taylor*, 5 Johns. 395; *Thompson v. Ashton*, 14 Johns. 316; *Chapman v. Murch*, 19 Johns. 290; *Sweet v. Colgate*, 20 Johns. 196. The vexations and expensive litigation which might often arise on the doctrine of a warranty implied from the soundness of the price are prevented by the adoption of a certain rule which can never operate unjustly, as by the buyer an express warranty may always be demanded."

⁶ 10 Mass. 197.

STONE (3 Bl. Comm. 164, 165) has classed the cases of deceit and breaches of express warranties in contracts for sales under the head of implied contracts. He says it is constantly understood that the seller undertakes that the commodity he sells is his own, and in contracts for provisions it is always implied that they are wholesome; and in a sale with warranty the law annexes a tacit contract that if the article be not as warranted, compensation shall be made to the buyer; and if the vendor knows his goods to be unsound, and hath used any art to disguise them, or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. It is obvious that in this very general classification, the details and examples are imperfectly introduced, and with some inaccuracy. It is not implied in every sale of provisions that they are wholesome, any more than it is in sales of other articles, where proof of a distinct affirmation seems, in Justice BLACKSTONE's opinion, to be requisite. The contrary may be, and often is, understood between the parties; and it is only when the false representation to be proved in the one case may be presumed or taken to be proved in the other, that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved to entitle the suffering party to the remedy, equivalent to a remedy upon an express warranty, as well in the case of provisions as in any other case. The difference is that in the case of provisions the artifice is proved when a victualer sells meat as fresh to his customers at a sound price, which, at the time, was stale and defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade. But cases may be supposed where, this presumption being repelled by contrary evidence, the seller would not be liable; as where a different representation is made, and this is proved directly, or is necessarily to be presumed from the nature of the article, the state of the market, or other circumstances. Indeed, there is nothing to be inferred in a sale of provisions which may not be inferred to a like purpose in other cases, when the calling or profession of the seller, the soundness of the price, and the nature of the article sold have been made the grounds of decision. There is an especial and invariable presumption as to the property of the vendor when the article sold was in his possession; and hence the distinction when the article is not in his possession. And upon the whole it will be found, I believe, in every instance that the action as for a deceit has been maintained in those cases only where an affirmation or representation willfully false, or some artifice, has been proved, or has been taken to be proved, either directly or because it was necessarily to be presumed from the circumstances and nature of the bargain, and the situation of the parties.

"It is admitted in the case at bar that in a bargain between these parties there was no direct affirmation of the soundness of the article. Perhaps, however, a representation to this effect is necessarily to be implied from the nature of the bargain, it being in the common course of dealing, and for a sound price, and for an article which, to be of any value, must be understood to be sound. This much, at least, may be safely presumed as the understanding between these parties: that as to the kind, the quality, the state, and quantity of the meat contained in the barrels sold by the one and purchased by the other as barrels of merchantable beef, the seller undertook to have full faith in the brand of the deputy inspector, a public officer employed and intrusted to ascertain these facts. The seller must be understood to represent that, for aught he had known to the contrary, the brand appearing on the barrels had been truthfully and faithfully applied, and that no alteration or change of the article had happened within his knowledge. Now, is there any

evidence or any circumstance in this transaction from which it may be inferred that in affirmation to this effect the sellers would have been wilfully false, or that, in an express representation, such as I have supposed to be implied in this case, they would have been guilty of an artifice? They would have been chargeable to that extent, if at the time of the sale they had any knowledge of the bad state of the barrels, such as it proved to be, or had any special reason to suspect that the beef in them had not been properly cured, was without sufficient salt, was already in a putrid state, or becoming putrid, or, in short, if they then knew, or actually suspected, that in this instance the inspector had been false, ignorant, or depraved. With evidence to that effect this case would be within the rule, and the plaintiffs entitled to this remedy for the deception which they had undoubtedly suffered, and from which a loss and damage had ensued. But on this point the evidence fails. Indeed, it is admitted that the defendants had no knowledge at the time of the sale of the unsuitable quality and state of the beef, or of the barrels containing it, or that it had not been packed as the law requires. In this state of the evidence and of the case, the result is in favor of the defendants. Against them the plaintiffs have no remedy for the loss and damage sustained by a deception which has not happened or been effected by any false representation or artifice chargeable to the defendants; and they took upon them no extraordinary risk in this particular by any warranty accompanying the sale."¹

In *Moses v. Mead*,² BRONSON, C. J., in reviewing the cases on the point, said: "We are referred to the authority of Blackstone for another exception to the general rule, and it is insisted that, on a sale of provisions, there is an implied warranty that they are wholesome. * * * The language of the commentator leaves it somewhat doubtful whether his mind was not upon a deceit in the sale, which stands on a different footing from a warranty. If he intended to affirm that the law implies a warranty of soundness in the sale of provisions, the remark is without any support in the English adjudications. The *dictum* of Blackstone has been directly overruled in Massachusetts.³ The doctrine of Blackstone, with a very important qualification, was affirmed by the judge who prepared the opinion in *Van Brucklin v. Fonda*;⁴ but that was plainly a case of fraud. The jury found that the beef was unsound and unwholesome, and that the defendant—the seller—knew the animal to be diseased. The case of *Hart v Wright*⁵ arose on a sale of provisions, and one member of the court of errors was for implying a warranty of soundness; but that doctrine did not prevail.

In *Humphreys v. Comline*⁶ two barrels of molasses were sold to a retail grocer. The purchaser did not examine it, at the time he purchased it, beyond looking at the outside of the barrels. The molasses when drawn was found to be unfit for consumption. In an action for the purchase price, it was held that there was no implied warranty that the molasses was fit for the purpose of food. "It is said," the court remarked, "that, in the sale of provisions for domestic use, a warranty is implied that they are sound and wholesome, on the ground that such a warranty is necessary for the preservation of health and life. But it has been denied that anything can be inferred from the sale of provisions which may not be inferred to a like purpose in other cases.⁷ In the last two cases, the warranty is put upon the ground of the deceit, and it is said the only difference is that, in the case of provisions, the fraud is more obvious; as, where a butcher sells stale and unwholesome meat

¹ And see *Hart v. Wright*, 17 Wend. 367; *Winsor v. Lombard*, 18 Pick. 61; *Howard v. Emerson*, 10 Mass. 320; *Goad v. Johnson*, 21 Minn. 70; *Goldrich v. Ryan*, 3 E. D. Smith, 324.

² 1 Denio, 378.

³ *Emerson v. Brigham*, 10 Mass. 197.

⁴ 12 Johns. 468.

⁵ 17 Wend. 287; 18 Wend. 449.

⁶ 8 Blackf. 516.

⁷ *Wright v. Hart*, 18 Wend. 464; *Emerson v. Brigham*, 10 Mass. 197; *Winsor v. Lombard*, 18 Pick. 57.

to his customers as fresh and sound, the artifice is proved by the fact itself, as his knowledge of the falsehood is to be presumed from the nature and duties of his trade or calling. Without deciding that point, however, or whether molasses, or such like articles, should be included under the term 'provisions,' if the rule that, by the sale of provisions, without any fraud on the part of the vendor, a warranty is implied, be well founded, we think that this case does not come within such rule, inasmuch as the molasses in question was not sold for immediate domestic consumption, but as merchandise, to a dealer, to be sold again at retail. To say that, in such cases, all articles which may be used in the diet of the human family are subject to a rule of law, as regards their sale, different from that which prevails in relation to other merchandise, would be to establish a distinction which might prove extremely inconvenient and troublesome in commercial transactions, and one not warranted by any analogous decisions."¹

§ 15. SAME—SALE DIRECT TO CONSUMER. The qualification noted above as being found in some of the American decisions, relates to the case of an article of food sold to a consumer for immediate use, as distinguished from the sale by a manufacturer or raiser to a dealer, or by a dealer to another dealer.

Thus, in *Bracklin v. Fonda*,² it was said: "In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril."

In *Howard v. Emerson*,³ where a cow had been sold to a retail dealer in meats, MARTIN, J., said: "We think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding which enters into the contract that the provisions are sound. The relation of the buyer to the seller, and the circumstances of the sale, may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer." In *Moses v. Mead*,⁴ BRONSON, C. J., said: "Although the doctrine of Blackstone cannot be supported in its whole extent, I am not disposed to deny that, on a sale of provisions for immediate consumption, the vendor may be held responsible in some form for the sound and wholesome condition of the article which he sells."

In *Hoover v. Peters*,⁵ to a suit for a balance of the price of the carcasses of three hogs sold by the plaintiff to the defendants, to be used by them as food in their lumber camp, the latter set up that one of the carcasses was unsound, and unfit for use. It was proved that the plaintiff knew the purpose for which the defendant purchased them. On the trial the defendant asked the court to charge that there was an implied warranty that the pork was sound and fit for food, which was refused. On appeal this was held error, and the judgment for plaintiff was reversed. "It seems to be settled by many authorities," said CAMPBELL, J., "that no implied warranty of soundness arises where such articles are purchased by a dealer to sell again. Whether this rule arises from the fact that any injury from the use of the articles is likely to be remote, and not readily traced out, or because, where his purpose in buying is merely speculative, one commodity is not to be distinguished from another in its incidents as merchandise, or what special reasons have led to it, cannot easily be determined. It stands as a recognized doctrine, whatever may have been its reasons. But where property is bought for a particular purpose, and only because of its supposed fitness for that, there are

¹ But see, apparently contra, *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; *Burch v. Spencer*, 22 N. Y. S. C. 504.

² 12 Johns. 268.

³ 10 Mass. 320.

⁴ 1 Denio, 378.

⁵ 18 Mich. 51.

many cases in which a warranty is implied, unless the purchaser has seen fit to act upon his own responsibility and judgment. And where articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of consideration is so complete, that we think the rule that has often been recognized, that such sales are warranted, is not only reasonable, but essential to public safety. There may be sellers who are not much skilled, and there may be purchasers able to judge for themselves; but in sales of provisions the seller is, generally, so much better able than the buyer to judge of quality and condition, that, if a general rule is to be adopted, it is safer to hold the vendor to a stricter accountability than to throw the risk upon the purchaser. The reason given by the New York authorities in favor of health and personal safety, is much more satisfactory than the purely commercial considerations, which take no account of these important interests. While the question has not, perhaps, been very often decided, the principle has been generally accepted among the legal writers, and we feel no disposition to recede from it. We have been pointed to no distinction between sales in one market or another, and can conceive of no special reason for regarding one sale for this purpose as differing in its incidents from any other. The doctrine seems to be that any purchase for domestic consumption is protected."

In *McNaughton v. Joy*,¹ it was held by a Philadelphia court that, on a sale of butter and potatoes for table use, there was an implied warranty that they were fit for such purpose.²

§ 16. SALE OF GOODS BY SAMPLE—THE GENERAL RULE. It is laid down in a large number of cases, and may be considered as well-settled law, that on the sale of goods by sample there is an implied warranty that the goods sold shall be equal in quality as well as of the same kind as the sample produced.³ In Pennsylvania, however, the later cases hold that on such a sale the warranty is only that the goods shall be of the same kind or species; that there is no warranty that they shall be of the same grade or quality.⁴

§ 17. SAME—NO WARRANTY OF MERCHANTABILITY. On a sale by sample, however, there is no implied warranty of merchantability, "for the seller, by exhibiting the sample and impliedly agreeing to bind himself that the bulk of the goods sold shall be equal to the sample, is thus supposed to relieve himself from all other liability in the matter, and therefore to exclude from the contract the implied stipulation of merchantability, on the principle of *expressum facit cessare tacitum*."⁵

§ 18. EXCEPTION—WHERE SAMPLE DOES NOT SHOW QUALITY. An exception to the foregoing rule exists where the quality cannot be judged of from the sample. A firm of manufacturers of shirting contracted to supply the plaintiff with a quantity of gray shirting according to sample, each piece to weigh seven pounds. The goods were delivered, and were of the right weight, but it was afterwards found that the weight was made up by introducing into the fabric a percentage of clay which made the goods unmerchantable.

¹ 1 Wkly. Notes Cas. 470.

² *Ryder v. Neitge*, 6 Heisk. 340; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Humphreys v. Comline*, 8 Blackf. 516; *Benj. Sales*, 665.

³ *Parkinson v. Lee*, 2 East, 314; *Parker v. Palmer*, 4 Barn. & Ald. 387; *Barnard v. Kellogg*, 10 Wall. 383; *Leonard v. Fowler*, 44 N. Y. 289; *Hargous v. Stone*, 1 Seld. 73; *Bradford v. Manly*, 13 Mass. 139; *Graff v. Foster*, 67 Mo. 512; *Gunther v. Atwell*, 12 Md. 157; *Gill v. Kaufman*, 16 Kan. 571;

Hubbard v. George, 49 Ill. 575; *Merriman v. Chapman*, 32 Conn. 146; *Brantley v. Thomas*, 22 Tex. 271; *Boothvy v. Plaisted*, 51 N. H. 436; *Borrekens v. Bevans*, 3 Rawle, 37; *Moore v. McKinley*, 5 Cal. 471; *Getty v. Rountree*, 2 Chand. 28.

⁴ *Fraleigh v. Bispham*, 10 Pa. St. 320; *Boyd v. Wilson*, 83 Pa. St. 319.

⁵ *Biddle*, War. § 159; *Parkinson v. Lee*, 2 East, 314; *Randall v. Newson*, L. R. 2 Q. B. Div. 102; *Sands v. Taylor*, 5 Johns. 404.

The presence of the clay could not be discovered in the sample. It was held that the sale by sample excluded the implied warranty of merchantability only as to such matters as could be judged of from the sample.¹

§ 19. EXHIBITION OF SAMPLES DOES NOT RENDER SALE ONE BY SAMPLE. And it is held that a mere production of a sample does not make the transaction a sale by sample, so as to raise an implied warranty that the goods in bulk are equal in all respects to the sample exhibited.

In *Barnard v. Kellogg*,² a leading though recent authority, a wool dealer in Boston sent to a dealer in wool in Hartford samples of foreign wool in bales, which he had for sale on commission, with the prices, and the latter offered to purchase the different lots at the prices, if equal to the samples furnished. The wool broker accepted the offer, provided the wool dealer at Hartford would come to Boston and examine the wool on a day named, and then report if he would take it. The wool dealer went to Boston, and after examining certain of the bales as fully as he desired, and being offered an opportunity to examine all the remaining bales, and to have them open for his inspection, which offer he declined, purchased. The wool proved, unknown to the vendor, to have been deceitfully packed, rotten and damaged wool and tags being concealed by an outer covering of fleeces in their ordinary state. The supreme court of the United States held that this was not a sale by sample, and that there was no implied warranty of quality, or that the goods were equal to the sample produced. "One of the main reasons," said Mr. Justice DAVIS, "why the rule does not apply in a case of a sale by sample, is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent." In this case it was clear that the purchaser had full opportunity to examine the goods, but was satisfied to dispense with it. Again, where the defendants wrote plaintiffs a letter saying that "advices received from Trieste this morning by an English packet quote first quality of Ferrara hemp same as sold to you," and the hemp had been represented as of first quality, but the plaintiffs here examined it by cutting open one bale, and might have examined all if they had desired, it was held that this was not a sale by sample. "The plaintiff," said BRONSON, J., "was told to examine, and did examine, the hemp for himself. He inspected the bales, cut open one of them, and was at liberty to open others, had he chosen to do so. If he was not satisfied of the quality and condition of the goods, he should either have proceeded to a further examination, or provided against a possible loss by requiring a warranty."³

In *Beirne v. Dodd*,⁴ the defendant sold the plaintiff, in his shop, a number of blankets in bales, exhibiting at the time to the plaintiff several pairs of the blankets, which the latter examined and found sound. The rest were not examined, though they might have been. On delivery they were found to be moth-eaten. "The mere circumstance," said JEWETT, J., "that the seller exhibits a sample at the time of the sale will not of itself make it a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods; because it may be exhibited, not as a warranty that the bulk corresponds to it, but merely to enable the purchaser to form a judgment as to its kind and quality. If the contract be connected, by the circumstances attending the sale, with the sample, and refer to it, and it be exhibited as the inducement to the contract, it may be a sale by sample; and then the consequence follows that the seller warrants the bulk of the goods to correspond with the specimen exhibited as a sample. Whether a sale be a sale by sample or not, is a question of fact to find from the evidence

¹ *Moody v. Gregson*, L. R. 4 Exch. 49; *Gardiner v. Grey*, 4 Camp. 114; *Boyd v. Wilson*, 83 Pa. St. 325; *Heilbut v. Hickson*, L. R. 7 C. P. 438.

² 10 Wall. 38.

³ *Sailsbury v. Stainer*, 19 Wend. 159.

⁴ 5 N. Y. 95.

in each case; and, to authorize a jury to find such a contract, the evidence must satisfactorily show that the parties contracted solely in reference to the sample exhibited; that they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it; or, in other words, the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was intended by the parties as a sale by sample. * * * That a personal examination of the bulk of the goods by the purchaser at the time of the sale is not practicable nor convenient, furnishes no sufficient ground, of itself, to say that the sale is by sample." The want of an opportunity, from whatever cause, for such an examination, is doubtless a strong fact in reference to the question of the character of the sale, whether it is made by sample or not; but it is, nevertheless, true that a contract of sale by sample may be made, whether such examination be practicable or not, if the parties so agree. Where the acts and declarations of the parties in making the contract for the sale of goods are of doubtful construction, evidence that it was impracticable or inconvenient to examine the bulk of the goods would be proper, and, in connection with evidence of other circumstances attending the transaction, might aid in coming to a correct conclusion in respect to the true character of the contract."¹

§ 20. IMPLIED WARRANTY OF TITLE—THE RULE IN ENGLAND. "It is very remarkable," said PARKE, B., in *Morley v. Attenborough*,² "that there should be any doubt on this subject, it being certainly a question so likely to be of common occurrence, especially in this commercial country. Such a point one would have thought would not have admitted of any doubt. The bargain and sale of a specified chattel by our law, which differs in that respect from the civil law, undoubtedly transfers all the property the vendor has, where nothing further remains to be done, according to the intent of the parties. But it is made a question whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor that he has the ability to convey." Mr. Baron PARKE, as a result of the consideration of all the cases held, "that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both."

Morley v. Attenborough was the case of the sale of an unredeemed pledge by a pawnbroker, and it was held that there was no implied warranty of title. A few years later the case of *Eicholz v. Bannister*³ was decided by the common pleas. Here the plaintiff purchased at the defendant's warehouse certain goods described as "a job just received by him." After the goods were delivered and paid for, it turned out that they had been stolen, and the purchaser was compelled to give them up to the true owner. He then brought an action for the purchase money paid by him, and it was held that he ought to recover.

It will thus be seen that the law in England on this subject is not very clear.

But Mr. Benjamin, in his work on Sales,⁴ says: "On the whole, it is submitted that since the decision in *Eicholz v. Bannister* the rule is substantially altered. The exception here became the rule, and the old rule has dwindled

¹ *Gardin v. Grey*, 4 Camp. 144; *Powell v. Horton*, 2 Bing. N. C. 668; *Tye v. Fynewmore*, 3 Camp. 462; *Carter v. Crick*, 4 Hurl. & N. 412; *Towerson v. Aspatna*, 27 Law T. (N. S.) 276; *Russell v. Nicolofulo*, 8 C. B. (N. S.) 362; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Megaw v. Malloy*, L. R. 2 Ir. 530; *Waring v. Mason*, 18 Wend. 425; *Ames v. Jones*, 77 N. Y. 614;

Atwater v. Clancy, 107 Mass. 369; *Schuitzer v. Oriental Print Works*, 114 Mass. 123; *Whitmore v. South Boston Iron Co.* 2 Allen, 52; *Jones v. Wasson*, 8 Baxt. 211; *Day v. Raguet*, 14 Minn. 273, (Gil. 203.)

² 3 Exch. 509.

³ 17 C. B. (N. S.) 708.

⁴ Page 839.

into the exception, by reason, as Lord CAMPBELL said, of having been well-nigh eaten away. The rule at present would seem to be stated more in accord with the recent decisions, if put in terms like the following: A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattels sold."¹

§ 21. IMPLIED WARRANTY OF TITLE—THE AMERICAN RULE. In the United States there is no such confusion or uncertainty in the decisions; but the implied warranty of title is well established. "It may now be regarded as well settled," says SHARSWOOD, J., "that a person selling as his own personal property of which he is in possession, warrants the title to the thing sold; and that if, by reason of a defect of title, nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor."²

§ 22. NECESSARY DEPRECIATION—NO IMPLIED WARRANTY. There is no implied warranty against a necessary and likely depreciation which may take place in the quality of the goods between the time of the sale and the delivery into the hands of the purchaser. Thus, when ale was sold in Chicago to a party in Montana, it was held that there was no warranty that it would bear transportation to Montana.³ So, where a sale of wheat was made by sample, the court said: "There is no pretense that there was any difference between the sample and the cargo, except that the latter was treated in a manner incident to every cargo of southern wheat. This deterioration of the cargo, and which undoubtedly prevented its malting, was a fact against which the exhibition of the sample did not warrant, and it is a fact with which the defendants (purchasers) must be presumed to be acquainted; for the law will presume every dealer in articles brought to market acquainted with all the circumstances usually attendant on cargoes composed of these articles."

§ 23. WARRANTY IMPLIED FROM CUSTOM OF TRADE. In the early English case of *Jones v. Bowden*,⁴ it was proved that on auction sales of drugs it was the custom to state in the catalogue whether the goods were sea-damaged or not. The defendants had offered for sale at auction a quantity of

¹And see *Brown v. Cockburn*, 37 U. C. Q. B. 592; *Johnston v. Barker*, 20 U. C. C. P. 220; *Mercer v. Cosman*, 2 Hann. (N. B.) 240; *Somers v. O'Donoghue*, 9 U. C. C. P. 210.

²*People's Bank v. Kurtz*, 11 W. N. 225; 2 Kent, Comm. 478; *Story, Sales*, § 367; *Ricks v. Delahunty*, 8 Port. 137; *Williamson v. Sammons*, 34 Ala. 691; *Hoe v. Sanborn*, 21 N. Y. 555; *McKnight v. Devlin*, 52 N. Y. 401; *McCoy v. Archer*, 3 Barb. 323; *Dresser v. Ainsworth*, 9 Barb. 619; *Vibbard v. Johnson*, 19 Johns. 77; *Hermann v. Vernoy*, 6 Johns. 5; *Sweet v. Colgate*, 20 Johns. 196; *Baker v. Arnot*, 67 N. Y. 448; *Whitney v. Heywood*, 6 Cush. 82; *Hubbard v. Bliss*, 12 Allen, 590; *Shattuck v. Green*, 104 Mass. 45; *Cushing v. Breed*, 14 Allen, 376; *Emerson v. Brigham*, 10 Mass. 202; *Coolidge v. Brigham*, 1 Metc. 551; *Grose v. Hennessy*, 13 Allen, 390; *Door v. Fisher*, 1 Cush. 273; *Fogg v. Wilcutt*, 1 Cush. 300; *Bennett v. Bartlett*, 6 Cush. 223; *McCabe v. Morehead*, 1 Watts & S. 513; *Moser v. Hoch*, 3 Pa. St. 230; *Boyd v. Bobst*, 2 Dall. 91;

Whitaker v. Eastwick, 75 Pa. St. 229; *Porter v. Bright*, 82 Pa. St. 443; *Ritchie v. Summers*, 3 Yeates, 531; *Chamley v. Dulles*, 8 Watts & S. 361; *Swaizey v. Parker*, 50 Pa. St. 450; *Flynn v. Allen*, 57 Pa. St. 482; *Lyons v. Devilbis*, 22 Pa. St. 185; *Wood v. Sheldon*, 42 N. J. Law, 421; *Byrnside v. Burdett*, 15 W. Va. 702; *Mockbee v. Gardner*, 2 Har. & G. 176; *Osgood v. Lewis*, Id. 495; *Chisin v. Woods*, Hardin, 531; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Marshall v. Duke*, 51 Ind. 62; *Long v. Anderson*, 62 Ind. 537; *Morris v. Thompson*, 85 Ill. 16; *Gookin v. Graham*, 5 Humph. 480; *Wood v. Cavin*, 1 Head, 506; *Calcock v. Goode*, 3 Me. 513; *Hale v. Smith*, 6 Me. 420; *Butler v. Tufts*, 13 Me. 302; *Gaylor v. Copes*, 16 Fed Rep. 49; *Storm v. Smith*, 43 Miss. 497; *Lewis v. Smith*, 4 Fla. 47; *Inge v. Bond*, 3 Hawks, 101; *Thurston v. Spratt*, 52 Me. 202; *Long v. Hickbottom*, 28 Miss. 772; *Huntington v. Hall*, 36 Me. 501; *Matheney v. Mason*, 73 Mo. 677; *Gross v. Kierski*, 41 Cal. 114.

³*Leggatt v. Sands*, 60 Ill. 158.

⁴4 Taunt. 847.

pimento, without saying anything about its condition, and it was purchased by the plaintiffs. It was held that there arose from this custom an implied warranty that the pimento in this case was not sea-damaged, "since it is usual," said MANSFIELD, C. J., "to mention the fact, if pimento is sea-damaged; when this is not mentioned as such, how would any one understand the catalogue, having simply the word 'pimento,' but not particularized as sea-damaged?" HEATH, J., concurred, and mentioned a trial before himself, and a *nisi prius* decision of his that where sheep were sold as stock, there was an implied warranty that they were sound; proof having been given that such was the custom of the trade.

In several cases in the courts of the United States, usage has been held sufficient to supply a warranty which otherwise would not have been implied.¹ But in by far the larger number of American adjudications on this subject usages of this character have been rejected, on the ground that they were intended to defeat the operation of a rule of law, and were therefore inadmissible.²

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¹Fatman v. Thompson, 2 Disn. 482; Gunther v. Atwell, 19 Md. 157; Sumner v. Tyson, 20 N. H. 384.

²Barnard v. Kellogg, 10 Wall. 383; Mixer v. Coburn, 11 Metc. 557; Casco Manufg Co. v. Dixon, 3 Cush. 407; People's Bank v. Bogert, 16 Hun, 270; Dodd v. Farlow, 11 Allen, 428; Thompson v. Ashton, 13 Johns. 416; 14 Johns. 316; Board-

man v. Spooner, 13 Allen, 353; Baird v. Mathews, 6 Dana, 129; Wetherell v. Neilson, 20 Pa. St. 448, (overruling Snowden v. Warner, 3 Rawle, 101;) Coxe v. Heasley, 19 Pa. St. 243; Beckwith v. Farnum, 5 R. I. 230; Dickinson v. Gay, 7 Allen, 29; Beirne v. Todd, 3 Sandf. 89; 5 N. Y. 73; Whitmore v. South Boston R. Co. 2 Allen, 52.

HOLMES ELECTRIC PROTECTIVE CO. v. METROPOLITAN BURGLAR ALARM CO.

(Circuit Court, S. D. New York. August 28, 1884.)

1. PATENTS FOR INVENTIONS—PATENT NO. 120,874—ELECTRIC LINING FOR SAFES.

Patent No. 120,874, granted to Edwin Holmes and Henry C. Roome, November 14, 1871, construed to be for an electrical covering fitting the outside of safes, as distinguished from an electrical protection applied to houses and other buildings, and to rooms, *held* valid, and a preliminary injunction granted.

2. SAME—EXPIRATION OF FOREIGN PATENT.

The provision of the Statutes that a United States patent for an invention previously patented abroad shall be so limited as to expire at the same time with the foreign patent, seems to mean that the term of the patent here shall be as long as the remainder of the term for which the patent was granted there, without reference to incidents occurring after the grant. It refers to fixing the term, not to keeping the foreign patent in force. Consequently, *held*, that the lapsing of the prior foreign patent for non-payment of tax does not affect the term of the United States patent.

Motion for Injunction.

Samuel A. Duncan, for complainant.

Burton N. Harrison, for defendant.

WHEELER, J. The orator's patent, No. 120,874, for an improvement in electric linings for safes, granted to Edwin Holmes and Henry C. Roome, November 14, 1871, appears to be for an electric

lining to an outer covering for the safe, insulated from the safe, and so arranged that an attempt to get through the covering will affect the electrical conditions, and thereby give an alarm. The inventors could not have a valid patent for protecting safes by electricity any more than Morse could for sending messages to a distance by that agency; neither could they for every form of device for that purpose, for various such devices existed before their invention. They were entitled to protection only for their specific improvements upon what existed before. *Ry. Co. v. Sayles*, 97 U. S. 554. So far as shown, there were no such insulated coverings fitting the outside of safes before. There was such protection for the outside of houses, and other buildings and rooms, but none for the safes themselves. The application of this form of protection to the safes themselves is different from that to habitable structures. The patent appears now to be valid for this specific improvement. The claims are for a safe provided with the outer covering, and for the covering.

It is also urged that the patent has expired, because the invention is the subject of a prior English patent which has been suffered to lapse for non-payment of tax. The statute merely requires that in such case the patent shall be so limited as to expire at the same time with the foreign patent. Rev. St. § 4887. This seems to mean that the term of the patent here shall be as long as the remainder of the term for which the patent was granted there, without reference to incidents occurring after the grant. *Henry v. Providence Tool Co.* 3 Ban. & A. 501; *Reissner v. Sharp*, 16 Blatchf. 383. It refers to fixing the term, not to keeping the foreign patent in force.

It is urged that infringement has been so far acquiesced in that a preliminary injunction would now be inequitable; but this claim does not appear to be borne out by the proofs. The fact of infringement is not in reality contested. The patent has been so far acquiesced in, respected, and upheld, that, appearing to be good and valid as to this specific form of electrical protection, it affords sufficient ground for a preliminary injunction to restrain further infringement by the use of this form.

Motion granted.

THE QUEEN OF THE PACIFIC.

(District Court, D. Oregon. September 9, 1884.)

1. SALVORS, WHO ARE, AND COMPENSATION OF.

A person rendering aid to a ship in distress is a salvor, whether he is a mere volunteer or acts upon the request of the owner or agent of the ship; and unless there is an express contract to the contrary, or such a one must necessarily be implied from the circumstances of the case, the law implies that the service is to be compensated for on the usual condition of the ultimate safety of the property.

2. SAME—AMOUNT OF COMPENSATION.

A salvor in pursuance of a request is entitled to compensation according to the circumstances of the case, although he is unsuccessful, if the property is not lost or is otherwise saved; but a mere volunteer is not entitled to any compensation unless he succeeds, and the fact that his reward depends on this contingency may enhance the amount of it; but even when a salvor acts in pursuance of a request, and it is manifest that the property in peril must be wholly saved or lost, his compensation also depends upon the contingency of success, and should be enhanced accordingly.

3. SAME—REWARD.

In awarding compensation for a salvage service the courts do not stop at mere payment for the work and labor performed, but go further, and give the salvor an appropriate reward in the interest of commerce and navigation.

4. SAME—ELEMENTS OF COMPENSATION FOR SALVAGE.

The elements that enter into the estimate in fixing the compensation for a salvage service are: (1) The value of the property saved and of that employed in saving it; (2) the degree of peril from which the saved property is delivered; (3) the risk to which the property and person of the salvor is exposed; (4) the severity and duration of his labor; (5) the promptness with which he interposed his services; and (6) the skill, courage, and judgment involved in them.

5. SAME—PAYMENT FOR SERVICE, WHEN NOT A BAR TO SUIT FOR SALVAGE.

A payment received by a salvor as for work and labor and use of material, upon the reasonable understanding on his part that the other and principal salvors would settle and receive payment on the same basis without a suit for salvage, is no bar to such salvor intervening for his interest in a suit subsequently brought by such other salvors for salvage, and receiving his due share of the award therefor, less the payment theretofore made.

In Admiralty.

M. W. Feckheimer and Henry Ach, for libelants

Milton Andros and Cyrus Dolph, for claimant.

C. E. S. Wood, for intervenors *Gray et al.*

John H. Woodward, for intervenors *Kidd & McDonald*.

DEADY, J. This suit is brought against the steam-ship *Queen of the Pacific*, "her tackle, apparel, furniture, appurtenances, and cargo," to obtain compensation for a salvage service rendered them by the libelants. It is brought by *George Flavel*, the managing owner of the steam-tugs *C. J. Brenham*, *Astoria*, and *Columbia*; and *W. S. Sibson*, the managing owner of the steam-tug *Pioneer*; and 21 others, comprising the crews of said tugs, and for all others entitled. The libel was filed October 13, 1883, and on the same day the vessel was arrested and delivered to the owner, the *Pacific Coast Steam-ship Company*, on a claim made by *Mr. C. H. Prescott*, its managing agent at this port. The answer of the claimant was filed on December 1st, and admits that the libelants performed a salvage service in respect to the vessel and cargo; and the contest between the parties is practically confined to the value of such service, and particularly to certain matters of fact, upon which the determination of this question largely depends.

On May 28, 1884, the *Ilwaco Steam Navigation Company*, *J. H. D. Gray*, and 19 others, the crews of the steam-tugs *Gen. Canby* and *Gen. Miles* and a scow, filed a libel of intervention on behalf of themselves, as the owners, agents, and crews of said tugs and scow, set-

ting forth the part they performed in the saving of the vessel, and asking that a corresponding portion of any sum allowed as a compensation therefor may be awarded to them by the court.

The answer of the claimant to the libel of intervention admits that the intervenors rendered the services alleged by them, but denies their alleged value and importance, and the circumstances of danger and risk relied on to give them enhanced value, and also sets up that they were paid for by the claimant at the time as follows: To said Gray, as agent for the said Ilwaco Steam Navigation Company, \$600; and to said Gray, personally, for the use and services of said scow and crew, and his own services, \$654.

An amendment to the libel of intervention admits the payment alleged in the answer, but denies that it was received in full satisfaction of the service rendered, but with the express understanding that it should not operate as a bar to the claim of the intervenors as salvors in any suit that might be instituted for salvage.

Between November 21, 1883, and April 24, 1884, three libels of intervention were filed by a number of persons who appear to have been employed and paid by the claimant to throw over cargo, or were of the volunteer crew of the boat from the life-saving station. From the answers of the claimant thereto it appears that this crew have a suit now pending against the Queen, in Washington Territory, for the same service, and that the stevedores were employed and paid by the claimant at the rate of half a dollar an hour for their labor, and the proof sustains the answers in both cases. No evidence was offered or argument made on behalf of these intervenors, and it is taken for granted that their claims are abandoned and their libels will be dismissed. Separate libels of intervention were also filed by John McDonald and John S. Kidd, alleging that they assisted in saving the Queen,—McDonald by serving as "sole fireman" for "ten hours or more" on the tug Pioneer during the time she was employed in rescuing the Queen, and Kidd as "sole engineer" on such tug during all such time. No defense is made to these claims, and they will be taken as confessed. Besides, that of Kidd is proven by his own testimony.

Briefly, the facts, either admitted or proven, concerning the stranding of the vessel and her rescue, are as follows:

On September 2, 1883, the steam-ship Queen of the Pacific, being engaged in the coasting trade between Portland and San Francisco, left the latter port for the former, and arrived off the mouth of the Columbia river in the forenoon of September 4th, where she anchored for a time within the sound of the automatic buoy, and then crossed the bar and entered the river by the south channel, under the direction of a licensed Columbia bar pilot, whom she carried for that purpose. The weather was very thick with fog and smoke, the wind was light, and the sea quite calm. As she came abreast of Clatsop spit the vessel lost the channel and turned to the southward; and at or near high water, and about 1:45 P. M., ran hard and fast on the

north end of said spit, in the quicksand, at a point about one-fifth of a mile to the south-westerly of a straight line drawn between Cape Disappointment and Point Adams lights, and about one mile and a third to the north-easterly of red buoy No. 2, and one mile and a half south of the wreck of the Great Republic, and within the 12-foot line, where she lay, heading south-easterly, at nearly a right angle with the channel, until she was pulled off the next day.

On this voyage the Queen had on board Mr. George C. Perkins, the vice-president of and a director in the Pacific Coast Steam-ship Company, and one of its general managing agents, and was fully equipped and manned. She was then about one year old, and worth \$485,000, and carried 160 cabin and 74 steerage passengers, and 1,860 measured tons of freight, worth \$315,000, of which \$95,000 worth was jettisoned, together with the United States mails and express matter of not less than \$22,750 in value. The passage money, which was prepaid in San Francisco, amounted to \$3,124.56. The freight on the whole cargo was \$8,955.07, and on the portion saved it was \$5,912.28.

As soon as the vessel stranded the master ordered the engines reversed, and attempted to back her off, but without success. Guns were at once fired and steam-whistles blown as signals of distress, and the chief officer, Mr. Hall, dispatched in a small boat to Astoria, with a message to Capt. George Flavel, one of the libelants, to send all the tugs under his control to the assistance of the Queen. The signal guns were heard by the lookout of the tug J. C. Brenham, then lying at anchor in Baker's bay, and the fact at once communicated to her master, M. D. Staples, who immediately started with his tug in the direction of the spit, taking with him, at the request of Capt. O. T. Harris, then in charge of the life-saving station at Cape Disappointment, a life-boat and volunteer crew. The weather was very thick, and the Brenham proceeded under a slow bell, at the rate of about six miles an hour, across the middle sand, directly for the spit, through a channel known to the master, and called the "Cut-off," and reached the vicinity of the Queen in about 25 minutes. The Brenham then drew about 11 feet of water, and approached within about 150 feet of the stern of the ship, and a little on the port quarter, and was hailed by some one thereon, and asked to "come closer." But, the tug striking the bottom, she withdrew from the ship near one-fourth of a mile, but within ear-shot, where she lay to until near 5 o'clock in the evening, when, having received about 125 of the Queen's passengers from her starboard gangway by means of the life and ship's boat, she proceeded to Astoria, where she arrived with the passengers at half past 6 o'clock, and delivered a message from the Queen, concerning their disposition, to the claimant's agent at that place.

In the meanwhile, the steam-tug Canby, the property of the Ilwaco Steam Navigation Company, then drawing from seven and a half to eight feet of water, in the course of its regular trip from Astoria to

Cape Disappointment, met Hall, of the Queen, on his way to Astoria in the small boat, when the master of the tug,—Thomas Parker,—learning what had befallen the Queen, returned with Hall to Astoria, where the latter delivered the message from the Queen for help to Flavel. The intervenor and agent of the Canby, J. H. D. Gray, having learned from Staples and Hall, on their arrival in Astoria, of the condition of the Queen, immediately and of his own motion equipped and manned a scow belonging to himself, then lying at Astoria, loaded with sand, and, taking it in tow of the Canby, carried it to the Queen, unloading the sand in the river as he went, and giving pilots Gundersen and Doig a passage there on the tug; and this he did with the purpose, then publicly avowed, of enabling the Queen to get a heavy anchor out astern in time to prevent the next tide from swinging her around or driving her further up on the sand, and to aid in lightening her of her cargo. Gray arrived at the spit between 4 and 5 o'clock, and anchored about 100 yards off the ship's port quarter, where, by means of a line to the Queen and one to the tug, the scow was used as a ferry between the two, whereon 100 or more passengers, with their hand baggage, were transferred from the Queen to the Canby, and Gray was about starting with them to Astoria, when, at the request of the master of the former, he transferred said passengers to the tug Pioneer, then lately arrived from Astoria, and remained with the Canby by the Queen to assist in putting out her anchor. That evening, at slack low water and about 9 o'clock, the ship's bow anchor, weighing about 5,500 pounds, was lowered onto the scow and towed astern about 100 fathoms by Gray, and dropped a little off the port quarter. A fourfold purchase was then applied to the inboard end of the 12-inch hawser attached to this anchor, and the fall carried to the steam-capstan, and hove taut for the purpose of preventing her from going further on the spit and also of helping her off on the next high tide.

On the morning of the 5th, Gray, after placing the scow along-side of the Queen, sent the Canby away on her regular business, but remained himself with the scow, and took from the ship baggage of the value of \$15,000, and express matter of much greater value, which, with the aid of the Gen. Miles, a steam-tug belonging to said Ilwaco Steam Navigation Company, he safely towed to Astoria on the afternoon of said day.

As soon as Flavel received the message from the Queen, on the 4th, he dispatched from Astoria the tug Pioneer, D. J. McVicar, master, to the assistance of the ship, which, with Hall and his small boat and crew on board, reached there about 5 o'clock P. M. of the same day, and anchored about one-fourth of a mile distant from the Queen, where she received the passengers from the Canby, as above stated, and then carried them to Astoria, where she arrived about 8 o'clock in the evening, and remained until the next morning. While dispatching the Pioneer, Flavel had the tug Astoria, then laid up at

her dock, made ready and a special crew employed, and sent to the aid of the Queen, where she lay until the next morning.

About 9 o'clock in the evening of the 4th a consultation was held on board the Queen, when it was decided that if the ship's anchor and propeller did not get her off at the next high tide the cargo should be jettisoned. And to this end the ship's engines were reversed, and both them and the steam-capstan worked at full speed for about two hours and a half, and until after high water, but without moving her. Accordingly, between 2 and 3 o'clock in the morning, a request was sent from the ship to the Astoria that she should go to Cape Disappointment and get some soldiers to aid in throwing over the cargo, but those on board, including Noyes, the Astoria agent of the ship, thinking it doubtful if any sufficient number of soldiers could be obtained at the cape, and also concluding that it was not safe to attempt to move in the dark, the tug did not leave her anchorage until 4 o'clock in the morning, when she returned to Astoria, where Noyes procured 40 laborers, and returned on the tug to the ship with them about 9 o'clock in the morning. The Astoria also took down a scow, and anchored it in the vicinity of the ship.

The tugs Pioneer and Brenham laid at Astoria all night, and returned to the ship about 7 or 8 o'clock on the morning of the 5th. On the same morning the tug Columbia was lying in Baker's bay, and the master, Alexander Malcolm, having been informed that the Queen was ashore, went to her aid about half past 5 o'clock and anchored. Soon after, at a request from the ship, the tug returned to the cape and brought back 24 men and a surf-boat, and then took the small remainder of the Queen's passengers to Astoria and returned to the ship about 11 o'clock. The crew of the Queen commenced throwing over cargo about 5 o'clock in the morning, and continued to do so until about 11 o'clock, aided by the men from Astoria and the cape as soon as they arrived. At first they discharged through the forward and after ports; but between 9 and 10 o'clock the star-board after-port had to be closed on account of the rising of the tide and the list of the ship to that side.

The libelant George Flavel is a seaman and master mariner of experience, and has been familiar with the entrance to the Columbia river, as the owner and manager of pilot and tug boats thereabout, for more than a quarter of a century. As the managing owner of the tugs Brenham, Columbia, and Astoria, and the managing agent of the tug Pioneer, he went to the assistance of the Queen on the morning of the 5th, and after boarding her had a consultation with the master of the ship and Mr. Perkins, substantially, according to the testimony of the latter, as follows: The master of the Queen said to Flavel, "We are in a tight place," and asked him what he thought of it. Flavel asked what we had been doing, and I spoke and said we had been throwing cargo overboard since daylight, and that we had an anchor out on the port quarter upon a 120-fathom

line, and that "we had held her in that position." Flavel said that was all right. "I asked him what the chances were for getting us off, and he said he did not know; that he would do his best." We chatted then a few moments and Flavel said: "All right; I will go on board and do what I can." I said: "All right; go on board and use your own best judgment, and do the best you can to rescue the ship, and we will do the best we can to look after her."

About half past 11 o'clock Flavel returned to the tugs in the life-boat, and caused the Brenham and Pioneer to be made fast to the ship's stern, by passing their hawsers through her port quarter and stern chocks, respectively, and then the Astoria gave her hawser to the Brenham, in which condition they pulled on the ship near an hour. The flood-tide was setting in pretty strong across the track of the tugs, and made it difficult to keep them in position. The Brenham and Pioneer, by reason of the current and swell, were driven together and materially injured, and were in danger of being very seriously injured, if not sunk. About 12 o'clock the Brenham's hawser—a large towing one—parted, and she and the Astoria were separated from the ship. The Columbia then attempted to give her hawser to the Queen, but failed, when Flavel boarded her and succeeded in making her fast to the ship in the place of the Brenham, along-side of the Pioneer. The Astoria was then placed in front of the Columbia, and the Brenham in front of the Pioneer, and the four tugs, thus placed, pulled at the ship from a half to three quarters of an hour, and until high water slack, when she came off the spit on an uneven keel with a list to port, rolling and striking the bottom, but in an uninjured condition, and proceeded on her voyage.

On leaving San Francisco the Queen drew 16 feet 3 inches forward, and 18 feet 2 inches aft, though owing to the consumption of coal on the voyage she must have lightened some before stranding, but how much is not shown. From the testimony of the river pilot—Stevens—who took charge of the ship at Astoria on the 6th, it appears that her draught aft was then nearly 17 feet and the draught forward was probably reduced in the same proportion.

The diameter of the ship's wheel is 16 feet, and, according to her model in evidence, the center of the hub, which is three feet in diameter, is nine feet above the line of the keel. At low water, the hub, when not covered by the swell of the sea, was clearly visible, from which it is rightly inferred that the ship had then not more than eight feet of water under her stern, when on an even keel. Her engines were rated at 3,000 horse-power, but were never worked beyond 2,100 or 2,200 horse-power. The engineer testifies that he commenced to work them about 12:40 p. m. of the 5th, but, as the wheel was buried in the sand, they worked slowly until it was cleared. They were working at their full capacity when the ship came off, and had been for the half hour immediately preceding. The engine that worked the steam-capstan, to which the anchor line was attached, is

about 50 horse-power, and was also working at its full capacity when the ship came off the spit. The combined power of the four tugs is a little over 1,100 horse-power, and the position they occupied with reference to the ship, when they first commenced pulling on her, was four points or less off her port quarter, but for some time before she came off it was about two points off said quarter.

In my judgment, Flavel acted wisely in keeping the tugs well off the ship's quarter, rather than astern,—at least, until the moment of high water, when she was expected to come off, if at all,—for by that means she was worked sideways in her bed, and thus freed from the pressure of the sand-bank which had naturally formed around her quarters and under her stern, and so far barred her way off the spit. And being unable by her own power, or any power applied directly astern, to work herself in her bed and break up this sand-bank in which she was imprisoned, it is altogether improbable that the Queen would ever have gotten off the spit by her own unaided efforts, or by any aid short of that furnished by Capt. Flavel.

According to the tide tables for the Pacific coast, published by the "U. S. Coast and Geodetic Survey Office," the second high water at Astoria, on September 4, 1883, occurred at 2:13 p. m., and the water rose 8.9 feet. The first high water on the next day occurred at 2:37 a. m., and measured 7.4 feet; and the second one at 2:39 p. m., and stood at 8.7 feet. The tides continued to decrease in height until the 10th, when they stood at 5.9 and 7.4 feet. By the "tide constants," given in the appendix to these tables, it appears that the high tides on the fourth and fifth of September occurred at "Clatsop (near Point Adams)" only seven minutes sooner than at Astoria, and were one-tenth of a foot lower. Counsel for the claimant assumes that the facts stated in this "constant" are true. But I do not understand that they are put forth as being anything more than approximately true, and in this instance they appear to fall far short of even that. Point Adams, at the nearest point, is over three miles from the place where the Queen was stranded, in a direction nearly E. S. E., and the tide is full at the latter place probably sooner than at the former. Capt. Harris, of the life-saving station at Cape Disappointment, testifies that the tide is 35 to 40 minutes earlier at the cape than Astoria, and that a steam-boat leaving the former place on a high tide will ordinarily carry it with her to Astoria. There is no direct evidence of the distance from the cape or the spit to Astoria, but there are a good many circumstances bearing quite directly on the question, and I think the fact is of that character that the court may take notice of it. By the chart of the mouth of the Columbia river, "Sheet No. 1," published by the United States coast survey, 1881, it appears that Astoria is about ten miles from Cape Disappointment, and about eight from the point where the Queen was stranded. Now, if the tide wave or swell moves from the cape to Astoria in 40 minutes, or a mile in four minutes, the tide would be high at the spit

about 32 minutes sooner than at Astoria. This conclusion accords with common observation and experience, while the statement that the tide wave moves from the spit to Astoria in seven minutes, or at the rate of a mile in seven-eighths of a minute, is contrary to both and improbable on its face. According to this conclusion, it was high tide on the spit, on the afternoon of September the 4th, at 1:41, and on the afternoon of the 5th at 2:07. It may, then, be regarded as morally certain that the Queen went on and came off the spit at high water slack.

During the 4th and 5th the weather was very thick, although the fog lifted some at times, and the night very dark. Around the Queen there was constantly a choppy sea, with a swell of about six feet, with an occasional tide rip or light breaker on her stern and starboard quarter, at low tide.

According to the observations recorded by the signal service at Fort Canby, the wind on September 4th was steady from the north at the usual times of observation, namely, 3:52 A. M., 11:52 A. M., and 7:52 P. M., at the rates of five, six, and seven miles an hour. On the 5th it was steady from the north at the first observation, at the rate of seven miles an hour; and at the second and third ones steady from the south at the rates of twelve and eleven miles an hour; and on the 6th it was steady from the south-east, at the first observation, at the rate of twelve miles an hour; and at the second and third ones steady from the south at the rates of eighteen and six miles an hour. Capt. Harris testifies that on the 6th there was a gale blowing from the south-east at Cape Disappointment, and a surf on the spit that would have made it very dangerous for the Queen if she had been there.

The Brenham, Columbia, and Astoria are wooden vessels. and draw about 10 feet of water each. The first is about 100 tons burden and 240 horse-power; the second is about 90 tons burden and the same power; and the third is about 125 tons burden and 300 horse-power. The Pioneer is an iron vessel of about 100 tons burden and 325 horse-power, and draws nine and a half feet of water. They were each manned with a master and sufficient crew, amounting in all to 23 persons. The only evidence in relation to their value is found in the testimony of the libellant, Flavel, and he estimates the value of the Brenham at \$25,000, the Astoria at \$15,000, the Columbia at \$35,000, and the Pioneer, he says, is held by her owners at \$60,000,—making in all the sum of \$135,000. These estimates are somewhat general, and, for the purposes of this case, I find the value of the tugs to be \$100,000. The cost of repairing the same, on account of the injuries sustained by them while engaged in pulling the Queen off the spit, including the value of four hawsers, either cut or broken in the operation, according to the testimony of Flavel, is \$3,386.84, to which he adds \$1,000 for repairs yet to be made to the Pioneer.

These tugs are maintained by their owners, primarily, for the purpose of towing vessels in and out of the Columbia river, and not the

business of wrecking. But, nevertheless, they are kept prepared for such service when needed, and their presence and maintenance about the mouth of the river is a very material security and benefit to the commerce of the Columbia.

The Canby and Miles are wooden vessels—the first one of 76 tons measurement and 8 feet draught, and the second one of 136 tons measurement and 11 feet draught. The scow is 50 by 20 feet, deck dimensions, and 4 feet deep in the hold. They were each duly manned, and the number of the crews amounted in the aggregate to 19 persons. The Canby is admitted to be worth \$15,000, and the Miles is alleged to be worth \$47,000, and the Scow \$600; but, for the purposes of this suit, I find or assume that they are worth, collectively, \$50,000.

In his testimony, the master of the Queen endeavors to show that the tugs under Flavel's charge were so badly managed that they were but little if any assistance to the Queen, and that, in fact, she floated off at high water with the aid of her anchor and machinery. But this view of the matter is opposed to the undoubted and controlling circumstances of the case, and contrary to the weight of the evidence generally. It is also in direct conflict with the contemporaneous and unpremeditated statement of the master contained in a card of thanks dictated by him to the editor of the *Daily Astorian* on September the 5th, and published over his signature as "Capt. Queen of the Pacific," in the issue of that paper of the seventh of the same month. In it, after premising that he wishes to return his "sincere thanks for the prompt courage" shown by so many "in aiding the Queen of the Pacific," he says:

"My special thanks are due to Al. Harris, (of the life-saving station;) to J. H. D. Gray, who stood by and helped from the start; to George Flavel, to whose determination we owe the safety of the vessel; to his experienced pilots; to the brave men who took off the passengers; and to the citizens who kindly cared for the passengers and provided them with all they required. The services of all were of the best nature, and are gratefully acknowledged. I shall ever hold them in remembrance, and again desire to express my sincere thanks."

On the same occasion the master publicly toasted Flavel as "the man who saved the Queen."

Now, after making all due allowance for the kindly and grateful mood in which this toast was probably drank and card published, it is impossible to reconcile what is said in either of them concerning the person "who saved the Queen," or "to whose determination" "the safety of the vessel" was due, and the evident drift and purpose of the master's subsequent testimony, and particularly with certain statements therein. It is easy to see that the card and the toast came from the heart, and the testimony from the head. The one is the spontaneous and unqualified statement of the witness' feelings and convictions cotemporaneous with the occurrence, while the other is plainly the studied and calculated afterthought in which he under-

takes to depreciate, as far as possible, the character and benefit of the libellant's services, with the intention, apparently, of diminishing their value in this suit.

It is also assumed in the argument for the claimant that the Astoria refused to assist the Queen in the effort made to get off on the morning of the 5th. But the evidence is satisfactory that no request for such assistance was sent to the Astoria that night, nor any other than the one to go to the cape and get men to help to throw over the cargo. The claimant also contends that the Queen moved astern at high tide on the morning of the 5th. The third officer testifies that by the use of the lead he observed her move astern about "nine feet." The master says she either moved or the anchor came home, but he does not say which, and gives no reason in support of either conclusion, save hearsay and conjecture. But the weight of the evidence and the probabilities of the case are decidedly against her having moved. Capt. Harris, who was on board at the time and took pains to observe the hawser, thinks she did not move until she came off. Neither did the master or any one else mention the fact, or even allude to it, when Flavel went on board the Queen to confer with him and ascertain her condition before going to work to try to get her off. And it seems to me highly probable that if the vessel had moved any appreciable distance during that tide, it would have been generally known or reported on board, and that it would have been mentioned to Flavel on this occasion as a material if not a hopeful circumstance. But if she did move a short distance—nine or even forty feet—this fact does not tend to show that her position was any the less dangerous, or that the service rendered her by the salvors was any the less valuable. The vessel did not come off, that is certain; and the only rational explanation of the fact, if it be a fact, is, as suggested by counsel for the libellants, that instead of being on a sloping bottom she was in a "pocket," or sink in the sand, and therefore in the more danger.

As a general conclusion from these premises, I find that the libellants, and the intervenors Gray and others, performed a salvage service in aiding to get the Queen off Clatsop spit, without which she would have been buried in the sand there long ere this; that the scow and the tug Canby, and particularly the four tugs employed in pulling the Queen off the spit, incurred material risk, and that the salvors, according to the respective positions and employments, displayed skill, judgment, and courage in saving the Queen, and taking off and removing to a place of safety her passengers, their baggage, express matter, and mails; that Capt. Gray, by his wise forethought and skillful appreciation of the Queen's situation, in taking the scow to the ship, as he did, for the purpose of getting out an anchor, and the attention and aid he gave to the doing of the same, contributed very materially to the saving of the vessel; that Capt. Flavel, by the skillful, courageous, and determined manner in which he maneuvered the four

tugs under his control on the 5th, under circumstances of more or less risk to them and to himself personally, rendered a very great service to the Queen, without which in all probability she would have been a total loss.

And the important question now to be determined in the case is the amount to be allowed the salvors. But preparatory to that, and as a part of it, the defense made by the claimant to the claim of the intervenors, Gray and others, must be considered and disposed of. This defense turns upon the effect to be given to what occurred between Gray and Perkins at Astoria on the morning of the 6th. The parties are substantially agreed in their account of the transaction, except in one particular. Briefly and substantially it was as follows: Mr. Perkins asked Capt. Gray to make out a bill for his services; that he wanted to get away to Portland. The latter wanted to know first if Flavel was going to settle, and the former said he thought he would, whereupon Gray made out his bills and presented them, and they were paid to him accordingly. Gray swears that when he presented the bills to Mr. Perkins he said, as he did so, these bills are for "services," but if there is a suit for "salvage," I want to come in with the rest; to which the latter replied, the bills are very reasonable, and shall be paid; and if there is any suit for salvage, you shall share with the rest. Mr. Perkins swears that he has "no recollection" of Gray's saying anything about any further claim in case of a suit for salvage, but that he volunteered the remark, when he received the bills, that if Flavel did not settle, and the case went to the court for adjudication, he was willing the court should "review" Gray's claim, if it could be done without hazarding the interests of the company.

It does not follow that because Mr. Perkins does not now recollect what Capt. Gray affirms he said, that the statement of the latter is not proven. But, admitting that it is not, I think the bills were presented and paid under the apprehension that Flavel was going to settle on the basis of "service," rather than "salvage," and that there would be no suit about the matter; but if it should turn out otherwise, and there was a proceeding for salvage, that Gray and others should not be prejudiced thereby.

Another point is made by the claimant as bearing on the question of the amount of the salvage, and that is: the service of the salvors was not voluntary, but rendered in pursuance of a request or employment on the part of the claimant. The authority cited in this connection is the case of *The Undaunted*, Lush. 90, 92. But the ruling in this case is only to the effect that, when the services are rendered in pursuance of a request from a vessel in danger or distress, the party rendering them is entitled to recover salvage, according to the circumstances of the case, although such services prove to be of no benefit, while one who volunteers his services to a vessel under the same circumstances, if unsuccessful, is entitled to nothing. But in

either case the law implies that the service is to be paid on the usual condition of the ultimate safety of the property in question. *The Versailles*, 1 Curt. 360. And whether the fact of a request shall affect the amount of the compensation for a salvage service must therefore depend upon the degree of danger in which the vessel is placed. If she is in no danger of destruction or serious damage, but only some slight injury, she may be a reasonable security for a salvage service rendered her upon request, although it should prove of no benefit to her. In such a case, compensation not depending on success, the amount of salvage may very properly be diminished accordingly. And, although not suggested in the argument, it may be admitted that if Mr. Perkins, as the general agent of the claimant, did in fact employ the salvors, on the credit of the Pacific Coast Steam-ship Company, to assist in the rescue of the Queen, assuming the solvency of the company, the risk of getting nothing for their services, if unsuccessful, would not enter into the transaction, and should not be considered in estimating the amount of their compensation. But nothing of that kind took place on this occasion. Certainly, neither the request sent to Flavel from the Queen for his tugs, which was only a more direct form of a signal of distress, nor the conversation between him and Mr. Perkins on the deck of the ship, in which the latter told Flavel, substantially, to do what he could to get the ship off and they would look after her, amounts to even an implied contract whereby the Pacific Coast Steam-ship Company became bound to pay the libelants for their services as salvors whether they were successful or not. But it also appears, from the master's testimony, that Mr. Perkins said to Flavel on this occasion, "We want your assistance—we make no bargain—we will do nothing;" from which it appears that the agent of the claimant, while accepting the services of the libelants, expressly declined to make any agreement concerning their value, or to bind his principal to the payment thereof in any contingency.

In the absence of an express contract to the contrary, or circumstances from which such contract is necessarily implied, the presumption is that the salvors went to work with the understanding and expectation that they would get their compensation, if any, in the usual way,—off the bed-rock,—out of the property saved. And there being no such contract or circumstances in this case, the salvors would have had no claim for salvage, if unsuccessful in their efforts to save the Queen, because she was in a peril from which she must have been wholly saved or become a total loss. So it is immaterial in this case whether the service of the salvors was rendered upon the request or employment of the ship or not. The service was a salvage one, and they could only look to the saved property for their compensation.

Nothing remains but to determine what compensation ought to be allowed the salvors. And this is always the perplexing question in these cases. Every case must turn largely on its own circumstances,

and, in the nature of things, the award, like the verdict of a jury in a case for damages, is somewhat arbitrary, and only approximately right and just. The value of the property saved is \$736,786.84, and the libelants claim that the award ought to be equal to 20 per centum of that amount, or about \$150,000. The claimant has not directly suggested what amount ought to be allowed for the service, but, from the awards made in the cases cited by counsel as furnishing a proper precedent or safe guide on this point, it appears that he is willing to allow from \$25,000 to \$35,000.

In awarding compensation for a salvage service, the courts do not stop at mere payment for the work and labor performed, but go further, and give the salvor an appropriate reward, in the interest of commerce and navigation. 2 Pars. Shipp. & Adm. 292.

In *The Versailles*, 1 Curt. 355, Mr. Justice CURTIS says:

"The relief of property from an impending peril of the sea by the voluntary exertion of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage; and when its compensation is not fixed by such a contract as a court of admiralty will enforce, it is to be adjusted according to those liberal rules which have been found beneficial to commerce, and have long formed a part of the marine law."

In determining the amount of the compensation for a salvage service the elements which enter into the estimate are: (1) The value of the property saved and that employed in saving it; (2) the degree of peril from which the saved property is delivered; (3) the risk to which the person and property of the salvor is exposed; (4) the severity and duration of his labor; (5) the promptness with which he interposes his services; and (6) the skill, courage, and judgment involved in them. *The Versailles*, 1 Curt. 361; 2 Pars. Shipp. & Adm. 293.

In all these particulars, save two,—the risk to the persons and property of the salvors, and the severity and duration of their labor,—this is a case for a large award. The property saved is of great value, and it certainly was in extreme peril, and that it could be saved at all was very improbable. The salvors acted promptly, and with great skill and good judgment; and while, on the whole, the risk sustained and the labor performed by the salvors was not very serious or severe, yet they were so material as to be well worthy of consideration.

After careful consideration of the whole matter I have concluded to award the salvors the sum of \$64,700, or a little less than 9 per centum of the value of the property saved, to be distributed as follows: For repairs on the Brenham, Columbia, and Astoria, including a new hawser to each, the sums of \$820, \$1,120, \$560, respectively, and to the Pioneer on the same account, \$700; to the tug Pioneer and its crew, \$14,000; and the tugs Brenham, Columbia, and Astoria, and their crews, \$27,000; to the tug Canby and its crew, \$4,500;

the tug Miles and its crew, \$500; and the scow and its crew, \$500. From the sums awarded to the several tugs and their crews, except the Miles, there must first be paid to each of the persons composing said crews on the fourth and fifth of September a sum equal to the following multiple of the monthly wages he was then receiving or was entitled to receive for ordinary service in a similar capacity: To each master, or person acting as such, eight times a month's pay; to each pilot and engineer, or person acting as such, six times a month's pay; to each mate, or person acting as such, four times a month's pay; and to each seaman, or other person of said crews, two times a month's pay.

From the sums awarded to the Miles and the scow, and their crews, there must be first paid to the persons comprising the latter as follows: To the master and pilot of the Miles, \$70; to the engineer, \$50; to the mate, \$30; and to the fireman, three deck hands, and the cook, \$20 apiece; to the foreman of the scow, \$60; and to the three deck hands, \$40 each.

The remaining portion of the award, \$15,000 is allotted to Capt. Flavel and Capt. Gray,—two-thirds to the former and one-third to the latter. The conduct of both these men on this occasion was highly meritorious and commendable, and deserves, in my judgment, special recognition in this award. Nor ought the fact to be overlooked, in this connection, that the latter has but one arm and the former is crippled in both hands. And, looking at Capt. Flavel's relation to this subject generally, as well as in this particular transaction, by the light of what is commonly known in this country, as well as the evidence in this case, it may be justly said, substantially, in the language of counsel, that the enterprise and gallantry displayed by him on September 5th was such as would reflect great credit on a much younger and abler man than himself. It is not common to find a man of 63 years of age, crippled in his hands and well able to live without labor, who will exert himself and incur the risk of bodily harm that Capt. Flavel did on this occasion. And his conduct was praiseworthy throughout. When his tugs were being seriously damaged, and their destruction seemed not improbable, he did not attempt to drive a bargain with Mr. Perkins for indemnity in case he was unsuccessful. But, regardless of consequences and determined to save the ship if possible, he persisted in his efforts, and by his presence and example directed and encouraged his men, and shamed them out of their very natural and reasonable apprehensions. Indeed, he was largely animated by a higher motive and purpose than the hope of obtaining any pecuniary reward. As is well known, the people of Oregon and adjoining territories were about to celebrate the completion of the Northern Pacific Railway. Distinguished persons from all parts of the world were bound here to participate in the event, some of whom were on the Queen. That this valuable vessel should become a wreck on our shores at such a time was regarded by all

concerned as a calamity to the country. Capt. Flavel shared this feeling, and as a matter of state as well as personal pride was willing and did make exertions and take risks that under other circumstances he might well have declined.

For nearly 35 years Capt. Flavel has been engaged in the business of pilotage, towage, and salvage about the mouth of the Columbia river, and within the jurisdiction of this court, and has never once sought the aid of the same to enforce a claim for such service. The reasonable and obvious inference from this fact is that his demands have not been extortionate or oppressive.

In the decree, provision must be made for deducting the sums heretofore paid the intervenors, Gray and the Ilwaco Steam-ship Company, for their respective services from the amounts awarded to them, and for the payment of the remainder only, and for the filing with the clerk of a stipulation by the owners of the tugs and scow, and the members of their several crews, containing a schedule or statement of the position or employment and monthly pay of each one of such crews, as a basis upon which the award shall be so far distributed. And in case such stipulation is not filed within 20 days thereafter, as to any of said tugs or crew, the matter may be brought before the court for determination on the petition of the person interested.

THE JAMES A. GARFIELD.

(District Court, S. D. New York. June 30, 1884.)

1. PILOTS—DUTY OF—UNKNOWN OBSTRUCTIONS—EAST RIVER—COSTS.

A pilot is not an insurer. He is only chargeable for negligence when he fails in due knowledge, care, or skill, or to avoid all obstructions which were known or ought to have been known to him.

2. SAME—INJURY TO TOW—COSTS.

The schooner J. B. O., drawing $17\frac{1}{2}$ feet of water, while in tow of the tug J. A. G., ran upon the edge of an obstruction in the East river, 400 to 500 feet easterly from the Nineteenth-street buoy, (Nes Rock,) near mid-channel. Shortly before the trial, the existence of a pinnacle rock 4 yards square on the upper surface, and $12\frac{1}{2}$ feet below low-water mark, was for the first time discovered and located in the precise region where the schooner struck. *Held*, that the schooner had struck upon the edge of the newly-discovered rock, previous ignorance of which was not a fault, and that the pilot having pursued the customary course, the tug was not liable for the damage; but, as the facts seemed to warrant the suit, the libel was dismissed without costs.

In Admiralty.

Owen & Gray, for libellant.

Beebe, Wilcox & Hobbs, for claimant.

BROWN, J. The libel in this case was filed to recover damages for alleged negligence in the pilot of the steam-tug James A. Garfield, in running the schooner James B. Ogden, which was in the tow of the

steam-tug, on the reef of rocks near the buoy off Nineteenth street, in the East river, on the twenty-second of January, 1882. The answer alleged that, before taking the schooner in tow, the pilot was assured that the schooner drew but 17 feet of water, and that the route taken by the pilot was where there was more than that depth of water, and where there were no known obstructions for vessels of that draught. The schooner was bound for the Manhattan Gas Company's dock, between Fourteenth and Sixteenth streets, East river; and in coming up the East river with the flood-tide, the ordinary safe course, which was the one pursued in this case, is to go to the eastward of the Tenth-street and the Nineteenth-street buoys, and to round the latter buoy to the northward, and come down between it and the New York shore. The schooner was lashed upon the starboard side of the tug, and as they were rounding the Nineteenth-street buoy, and at a distance from it variously estimated at from 50 to 500 feet, the schooner suddenly struck the bottom, keeled over a little to starboard, and in a moment after swung clear. At the time she struck, the Nineteenth-street buoy, which is over Nes ("Easby") Rock, bore about two or three points on the port bow of the schooner, and the latter was heading for the New York shore at somewhere about Thirtieth street.

The weight of evidence is clearly to the effect that the schooner passed much further off from Nes Rock than 50 feet, the lowest estimate above given, and that she was at least two or three lengths distant from it. She was about 165 feet long. Nes Rock, according to the chart of the harbor, is $14\frac{1}{2}$ feet below mean low water. The average tide in this harbor is 43 inches. It was high water at Governor's island at 1:21 p. m. on the day of this accident, and, although the tide was still running flood, as it was then near high water, there must have been about 18 feet of water immediately over Nes Rock, and much more on all sides of it, as its surface is but about four square yards, and its sides are precipitous. The schooner drew but $17\frac{1}{2}$ feet at her stern, and 17 feet forward; and there would seem to be no reason, therefore, for her grounding upon or very near to Nes Rock, irrespective of the master's alleged statement that she drew but 17 feet.

I am satisfied that the true explanation of the grounding in this case is to be found in the recent discovery of another rock, which was first discovered in May of this year, to the eastward of Nes Rock, only a few weeks before the trial of this cause. In that month the new Sound steamer Pilgrim, drawing from 12 to 13 feet, tore a hole in her bottom in passing at what was supposed to be a safe distance to the eastward of Nes Rock. This led to a re-examination and survey by the officers of the United States coast survey, who, under date of May 31, 1884, have reported a notice to mariners (No. 48) of a "dangerous rock in the East river," described and located as follows: "A pinnacle rock not over four yards square, and situated 150 yards out-

side of Nes Rock, and on the prolongation of Twentieth street, New York city. It is 130 yards west of the central line of the channel, and on the following bearings: N. E. corner of Cob dock, (navy-yard,) S. by W.; Burnt Mill point, W. S. W. $\frac{1}{2}$ W.; S. E. corner of Bellevue hospital, N. N. W. The least water found over the rock was $12\frac{1}{2}$ feet." It is now marked by "a buoy with red and black horizontal stripes, which may be passed on either hand."

Incredible as the existence of such a rock without previous discovery might seem to be, in a pathway so long traversed by vessels of a sufficient draught to strike it, there can now be no doubt of the fact. Its distance from Nes Rock is 150 yards, or 450 feet, which is less than three lengths of the schooner, and agrees well with considerable of the testimony as to the location where this schooner struck. At that time there was probably about 16 feet of water over this pinnacle rock. The schooner probably grazed the north-easterly border of it, gliding off quickly and doing her some damage, but not breaking any hole in her bottom. There is no other known obstruction in the vicinity of the path of the schooner, as established by the evidence, that was not at this time more than $17\frac{1}{2}$ feet below the surface of the water; and from this fact, as well as from her distance from Nes Rock, I can have no doubt that the schooner struck upon the newly-discovered pinnacle rock. A pilot is not an insurer. He is only chargeable for negligence when he fails in due knowledge, care, or skill, or to avoid all obstructions which were known or ought to have been known to him. *The Margaret*, 94 U. S. 494; *The M. J. Cummings*, 18 FED. REP. 178; *The Niagara*, 20 FED. REP. 152. The course followed by him in this case was the customary one, and nearly in mid-channel. The existence of this obstruction was previously unknown. No fault can be ascribed to him in not knowing of its existence, and consequently he is not liable for the accident. The libel must therefore be dismissed; but, as the circumstances seemed to warrant the institution of the suit, the dismissal should, in this case, be without costs.

THE MAYUMBA. (Five Cases.)

(District Court, S. D. New York. July 25, 1884.)

COLLISION—TUG AND TOW—STEAMER UNINCUMBERED BOUND TO KEEP OUT OF THE WAY.

A steamer having easy and perfect command of her own movements is bound to keep out of the way of a cumbersome tow going slowly with the tide, where there is nothing in the way to prevent the steamer's doing so. The steamer *M.*, coming up the bay, sighted a tug with a heavy tow on a hawser, going down, being altogether 800 feet long, and some two miles distant. She was at first

to the westward of the tow, but worked across to the eastward, and finally came in collision with the end of the port side of the tow. On contradictory evidence as to the place of collision, and whether the steamer was in motion or not, *held*, that the steamer had abundant room to avoid the tow on either side; and that whether she had stopped her engines or not, during a debate as to whether she should go to Red Hook or Brooklyn, she was equally at fault in not keeping out of the way of the tow.

In Admiralty.

E. D. McCarthy and *J. A. Hyland*, for libelants.

Goodrich, Deady & Platt, for claimants.

Brown, J. On the third of December, 1882, at about 11 A. M., as the steamer *Mayumba* was coming up from quarantine, when not far from Bedloe's island, she met a large tow going down, and came into collision with the port side of it, near the end of the tow, whereby several of the boats and their cargoes were damaged, on account of which the above six libels were filed. The day was clear; the bay unobstructed; the wind fresh from the N. W., blowing about 14 miles per hour; the tide, the last of the ebb; the tow, running at about the rate of 3 to 3½ knots per hour through the water. The tow consisted of some 30 boats, in 5 or 6 tiers, attached by hawsers about 80 feet long to the two tugs, *Wilbur* and *Halliard*, so that the whole length of the fleet was about 800 feet. The tow left Jersey City at about 9:40 A. M., bound for Perth Amboy, via the Kills. Its course was first across the North river, to near the New York shore; thence to the south-eastward, to avoid some incoming vessels; thence down stream past Governor's island, and about a quarter of a mile to the westward of Castle William; and thence heading W. S. W., crossing the channel somewhat to the westward, towards the Jersey shore, to the northward of Robbins' reef.

There is great conflict in the testimony as to the place of the collision. The substantial claim of the defense is that the *Mayumba* had run as far to the eastward as she could safely go, having got to the easterly line of the channel, and to the edge of the flats off Red Hook. Her captain testifies that when he saw the collision impending he directed her tug, the *Raymond*, to shove her bows further eastward, but that the pilot in charge countermanded his order, saying: "Don't do that, captain; we are ashore now." The pilot died before the trial, and his testimony was not previously taken, to confirm any inference which might naturally be drawn from this remark as to their proximity to the east line of the channel. The language attributed to him is in form an exaggeration; and there are so many inaccuracies in the master's testimony that the other proofs cannot be suffered to be outweighed by an alleged statement by the pilot of this character, not substantiated by his own oath as to his language or its truth. The other proofs leave no doubt in my mind that the tow, at the time of the collision, was not near the flats referred to; but abreast of a point somewhere between Bedloe's island and Oyster island, and at least a quarter of a mile to the westward of the east-

erly line of the channel. The two tugs that had charge of the tow were fully able to handle it readily; it was not excessive or unusual in size; the wind was not more than a strong breeze, not approaching a gale; and there was no conceivable reason why the tow should have been along the easterly edge of the channel, but every reason to the contrary; since she was bound for the westerly side of the bay to the Kills, and all her witnesses state positively that she was not far from the middle of the channel, while the claimant's witnesses vary considerably in the position they give. I must hold, therefore, that there was plenty of room for the Mayumba to have gone on either side of the tow, as the libelant's witnesses testify.

The testimony of the Mayumba's own witnesses is contradictory as to whether the Mayumba was in motion or not at the time of the collision. The libelant's witnesses say that she was. It appears certain, however, that she was at first designed to land near Red Hook, and had been headed towards it, then crossing the tow's course, as the latter's witnesses testify; but that on account of the strong wind a debate ensued between her captain, her pilot, and the pilot of the tug-boat Raymond, which went down to help her, as to the advisability of going in to Red Hook, and that that design was abandoned, and that it was determined to go to Woodruff's stores, Brooklyn. This debate is stated to have lasted some 15 minutes, during which the Mayumba's speed was more or less checked. Some of her witnesses say that she was entirely stopped, and that while thus stopped the tow drifted down upon her. But whether her engines were stopped or not, I think she was equally at fault in getting and remaining in the way of the tow, when there was abundant room, as I find there was, on either side for her to have moved out of the way. The tow could not stop nor move much out of her course. The tug and tow were plainly visible several miles off; they were proceeding ahead at a moderate speed, and they did nothing to embarrass the Mayumba in keeping out of the way. If the latter was not bound under the rules to keep out of the way on account of her position, as alleged by the libelants, when near Robbins' reef, having the tow on her starboard hand, (which the Mayumba denies,) yet, from her perfect and easy command of her own motions, she was bound to keep away from the tow, when there was nothing to prevent her doing so. It clearly is no justification of her course to say that she steamed in front of the tug and tow, and then stopped until the latter drifted down upon her. It was her duty to exercise diligence in avoiding a collision, and I can see nothing to have prevented her easily doing so.

I cannot perceive any fault in the tug or tow, and consequently the Mayumba must be held liable. The true cause of the collision, as well as of many of the inaccuracies in the testimony of the Mayumba's most important witnesses, was, doubtless, the fact that they were so much occupied in discussing whether they should go to Red Hook or to Brooklyn that they paid too little attention to the tug and

to testify accurately concerning them, or to take timely measures to avoid them.

The libelants are entitled to decrees, with costs, and a reference to compute the amount of damages, if they are not agreed upon.

THE VELOX, her Tackle, etc., *ads.* WOSKE and others.

SAME *ads.* WILKINS and others.

In re Petition of RAYMOND and others *v.* The Proceeds of THE VELOX.

(District Court, S. D. New York. August 2, 1884.)

1. MARITIME LIENS—WAGES—TRAVELING EXPENSES—STEVEDORE'S SERVICES AND SHIP'S NECESSARIES—ORDER OF PRIORITY.

Seamen having shipped at Japan upon a Dutch vessel for a voyage to New York and back, and the voyage being broken up by a sale of the vessel in New York, *held*, that the liens of the master and seamen were regulated by the Code of the Netherlands, and that they were entitled, under the fifth rank of privilege, to priority out of the proceeds of the ship for the payment of their wages and "double advance" over liens for supplies and stevedore's services furnished in New York, which come under the sixth rank as ship's necessities. Traveling expenses were disallowed under the proofs.

2. SAME—DUTCH CODE—SHIP AND FREIGHT DISTINGUISHED.

The freight being also attached, and no express order of privilege on freight being established by the Dutch Code, *held*, under the equities of this case, that the freight should be shared *pro rata* by the ship-chandler and stevedore, and by the master and seamen for the residue of their claims not paid from the proceeds of the ship.

In Admiralty.

Jas. K. Hill, Wing & Shoudy, for libelants, Woske and others.

Sidney Chubb, for libelants, Braker and others.

BROWN, J. The proceeds of the ship and freight being insufficient to satisfy all the liens, the respective claims must be discharged according to the priorities prescribed by the Commercial Code of the Netherlands, as the law of the country to which the ship belongs. Section 313 of that Code prescribes the order of paying liens "out of the proceeds of sea-going ships." This section does not, however, in terms include freight. By the general maritime law the freight is liable for wages and other charges incurred in earning it. Section 451 of the same Code declares the ship and freight specially liable for wages; but I have not been referred to any section of the Code which necessitates the same order of privilege upon the freight as upon the ship. The stevedore's services are as essential to the earning of freight as the seaman's previous services, and the former has an equal equity, therefore, with the latter. In the absence of any

express provision subordinating the former to the latter, I feel justified in placing them both upon the same level. The same, also, as respects the ship-chandler's supplies, which were mostly for provisions for the support of the officers and crew. The proceeds of the ship itself must be distributed as provided by section 313. To the second and third order of privilege under that section belong "port charges, and guard, keeper, and porter's wages." These will include the small charges for watchman, consul's fee, and towing, amounting together to \$32, which must, therefore, be paid in full. The stevedore's and the ship-chandler's claims, although arising in port, are not port charges, within the meaning of subdivision 2, but fall under subdivision 6, as "ship's necessities." They are, therefore, subsequent in the order of privilege to the wages of the master and crew, which are entitled to priority under the fifth subdivision.

The sums in the registry of the court applicable to the payment of all the claims with costs are \$1,040.66, as proceeds of the ship, and \$525.80 as freight money, which was also attached in the cause. The costs and charges of the clerk, commissioner, and proctors in all the proceedings amount to \$196.85. The two funds should be kept distinct, and the costs and charges apportioned to each *pro rata*, as no grounds of a different division appear. After deducting from each its proportion of the costs, what remains of the proceeds of the ship must be applied, first, to the payment of the three items amounting to \$32, above referred to, which are prior in order of privilege; and next to the payment of the wages of the master and crew, including \$368, the double advance due to the crew, "as wages," under sections 411 and 412. The sum of \$900, estimated traveling expenses of return to Japan, I disallow. The proceeds of the ship, being insufficient to pay these wages, are to be divided among them *pro rata*, so far as the proceeds of the ship will go. What remains thereafter unpaid is entitled to come in concourse with the claims of the stevedore and the ship-chandler against the residue of the freight money, after deducting its proportion of costs. For the deficiency of the claims of the stevedore and ship-chandler, after the *pro rata* distribution of the freight, although the master would seem to be liable, yet, as he has not been sued *in personam*, no judgment or relief against him can be ordered in these proceedings.

Decrees may be entered in accordance herewith.

See *The Senator*, 21 FED. REP. 191; *The E. A. Barnard*, 2 FED. REP. 712; *The Windermere*, Id. 722, 727; *Gilbert Hubbard & Co. v. Roach*, Id. 394; and *The Canada*, 7 FED. REP. 119; *The Ole Oleson*, 20 FED. REP. 384; *The Hattie M. Bain*, Id. 389; *The J. W. Tucker*, Id. 129.—[ED.]

GLOVER v. SHEPPERD and others.

(Circuit Court, W. D. Wisconsin. August, 1884.)

JURISDICTION OF CIRCUIT COURT—TRANSFER OF INTEREST PENDING HEARING—CITIZENSHIP—SUPPLEMENTAL BILL.

G., a citizen of Wisconsin, brought a suit in the circuit court of the United States for the western district of Wisconsin against S., a citizen of Minnesota, and W., a citizen of Ohio, to set aside a tax deed upon his land, situated in Wisconsin, as a cloud on his title, and, after the case was ready for trial and set down for hearing, transferred his entire interest in the land to C., a citizen of Minnesota. *Held* that, although C. could not originally have brought the suit, the jurisdiction of the court, having once attached, was not divested by the transfer in such a manner that the assignee could not, by a supplemental bill, or an original bill in the nature of a supplemental bill, filed in the circuit court, continue the jurisdiction of the court, and retain and preserve the benefit of the former proceedings in the suit of G. against the same defendants.

In Equity.

Pinney & Sanborn, for complainants.

Sloan, Stevens & Morris, for defendants.

BUNN, J. This action was originally brought by John E. Glover, a citizen of Wisconsin, complainant, against the defendants, Harvey C. Shepperd, a citizen of Minnesota, and Henry B. Waldron, a citizen of Ohio, to set aside a certain tax deed upon the complainant's land, situate in the county of Saint Croix, Wisconsin, as a cloud upon the title. Issue was joined therein, testimony taken, and the cause ready for hearing and set down for hearing in this court, when the complainant, Glover, transferred his entire interest in the land to Margaret Coles, a citizen of Minnesota. Whereupon complainant's solicitors now move to file a supplemental bill, or an original bill in the nature of a supplemental bill, in behalf of Margaret Coles, the assignee of Glover, the original complainant, setting forth all the proceedings in the original cause, and praying that the defendants may be required to answer the said bill. The defendants' attorneys at the same time move for a dismissal of the case, on the ground that the transfer of the complainant's entire interest in the subject-matter of the action worked an abatement of the suit, and that the assignee, being a citizen of the same state as one of the defendants, and not competent to maintain an original suit in this court, cannot attain the same ends by a supplemental bill, or by an original bill in the nature of a supplemental bill.

It is conceded that Mrs. Coles being a citizen of the same state with the defendant Shepperd, could not maintain an original suit in this court; and the question is whether the jurisdiction of this court, having once attached, is divested by the transfer of Glover in such a manner that his assignee cannot, by a supplemental bill, or an original bill in the nature of a supplemental bill, filed in this court, continue the jurisdiction of this court, and retain and preserve the ben-

effit of the former proceedings in the suit of Glover against the same defendants.

There is, perhaps, no adjudged case precisely in point. Those nearest are *Clarke v. Mathewson*, 12 Pet. 164, and *Dunn v. Clarke*, 8 Pet. 1, which Mr. CURTIS, in his work on the Jurisdiction of the United States Court, 121, cites as an authority for the doctrine which he expressly lays down, that where, by a change of interest or other circumstances, parties come in to succeed to property which was brought under the jurisdiction of the court by a proper proceeding originally, no such change will defeat the jurisdiction. The case of a change of interest which Mr. CURTIS puts, and which he says was decided in *Dunn v. Clarke*, is the case at bar. The only question is whether this and the other cases cited by him are authority for the proposition which he puts. But I am of opinion that they are. The principle deducible from the cases seems to be that, the court having once obtained jurisdiction of the parties and the subject-matter of the controversy, the jurisdiction is not divested by any subsequent event affecting either the citizenship of the parties or the interest in the subject-matter of the suit.

Morgan's Heirs v. Morgan, 2 Wheat. 296, was a case brought in the United States circuit court for Kentucky by non-residents of that state for the specific performance of a contract for the sale of real estate. After the commencement of the suit one of the complainants removed into the state of Kentucky, where the defendants resided. The court, by MARSHALL, C. J., ruled that the jurisdiction of the federal court, having once vested, was not divested by the change of residence of either of the parties.

Clarke v. Mathewson, 12 Pet. 169, was originally a bill in equity brought by one Wetmore, a citizen of Connecticut, against defendants who were citizens of Rhode Island. After the cause was at issue, and pending proceedings under reference to a master, the complainant died, and Clarke, a citizen of Rhode Island, was appointed administrator of his estate. Clarke filed a bill of revivor, by which all these facts were made to appear, and from which it was evident that the bill could not be maintained if it was considered wholly as an original suit, because the complainant and defendants were all citizens of Rhode Island. This objection to the jurisdiction was made by the defendants and sustained by STORY, J., and the case dismissed at the circuit. But, upon appeal to the supreme court the judgment was reversed, and the cause sent back for trial, Judge STORY himself delivering the opinion, in which it was held, all the judges concurring, that the bill of revivor was in no sense an original suit, but was a mere continuation of it; that the parties to the original bill were citizens of different states, and the jurisdiction of the court completely attached to the controversy; that, having so attached, it could not be divested by any subsequent event.

That case may perhaps be distinguished from the one at bar in

this: that the bill filed in the reported case was simply a bill of revivor, and, as the court say, was in no sense an original bill. In the case at bar, in order to obtain the advantage of the previous proceedings, the complainant must file what is known in equity pleading as an original bill in the nature of a supplemental bill. But this would not seem such a difference as would serve to divest the court of the jurisdiction over the controversy obtained by the original bill, in the one case more than in the other, and Judge CURTIS, in the work referred to, on page 121, after citing the above cases, says:

"And these principles are just as applicable to any other change of parties as to that which occurs in case of removal or death. It is applicable where, owing to a change of interest or from other circumstances, parties have come in to succeed to the property which was brought under the jurisdiction of the court by a proper proceeding originally, and no change will defeat the jurisdiction."

I can discover no reason why the jurisdiction should be defeated in the one case more than in the other, though there be a technical difference in the procedure by which the new party in interest retains the benefit of the former proceedings. And that he may file a bill by which the benefit of the testimony and proceedings taken and had in the original suit shall be retained, is quite clear. See *Mitt. Eq. Pl.* (Ed. of 1876,) p. 195. In case of the death or bankruptcy of the complainant the transfer of interest is by operation of law. Here it is by the act of the party. But in either case the transfer is entire and complete, and the new party in interest, as complainant, being a resident of the same state with defendant, could not maintain an entirely original suit. So that, whatever the proceedings may be termed by which the original suit is continued, or the benefit of its proceedings is made to inure to the new complainant, whether technically called a supplemental bill, a bill of revivor, a bill of revivor and supplement, an original bill in the nature of a bill of revivor, or an original bill in the nature of a supplemental bill, the jurisdiction of the court attaches by reason of the original bill. If the jurisdiction is lost, there would probably be no way in which the complainant could avail himself of any benefit from the depositions and proceedings taken in the original suit. And this is one important point in which the proceeding differs from an entirely new and original bill not in the nature of a bill of revivor or supplemental bill. The new bill, whether technically a bill of revivor, a supplemental bill, or an original bill in the nature of a supplemental bill, is no more an original suit than the one in *Clarke v. Mathewson*, but is in substance and effect but a continuation of a controversy set on foot by the original bill, wherein the jurisdiction of the court had once fully attached.

In *Dunn v. Clarke*, 8 Pet. 1, there was a judgment at law obtained by one Graham, a citizen of Virginia, against parties residing in Ohio, to recover certain lands in ejectment. *Dunn*, a citizen of Ohio, held

the lands in trust under the will of Graham, who had died. Clarke and other complainants, all citizens of Ohio, brought a bill in equity for a perpetual injunction against the judgment in ejectment, and to obtain a conveyance of the land. All the parties being citizens of Ohio, a serious question arose in the supreme court as to whether the circuit court had jurisdiction. The supreme court held that it had, so far as the action against Dunn, the representative of Graham, was concerned, although he was a citizen of Ohio, on the ground that, the jurisdiction having once attached in the ejectment action, and the new suit in equity being in substance a continuation of the previous proceedings, rather than an original bill, the court was not divested of its jurisdiction. This is certainly a very strong case, as is also that of *Clarke v. Mathewson*, and I think they should rule the one at bar.

In *Freeman v. Howe*, 24 How. 450, the supreme court held that when a marshal had attached property under a process from the circuit court, an action of replevin would not lie in the state court to recover it from his possession. And the court puts the decision on a ground very similar to that of the other cases cited, to-wit, that the jurisdiction of the court, having once attached, cannot be divested, and that all questions relating to the property, once in the custody and under the jurisdiction of the court, must be determined by that court. On a like principle it was held in *Huff v. Hutchinson*, 14 How. 586, that a marshal, even after he had gone out of office, was competent to sue in a court of the United States, on an attachment bond, citizens of the state of which he was himself a citizen, averring on the record that the suit is brought for the benefit of the plaintiff in the original action, and that they were citizens of another state.

The motion to dismiss is overruled, and the complainants are given leave to file their supplemental bill, or original bill in the nature of a supplemental bill, as prayed for by them.

COVINGTON CITY NAT. BANK v. CITY OF COVINGTON and others.¹

FIRST NAT. BANK v. SAME.¹

(Circuit Court, D. Kentucky. August, 1884.)

L. TAXATION—NATIONAL BANKS—KENTUCKY.

The city of Covington, Kentucky, assessed a tax for municipal purposes upon the surplus fund and undivided profits, the real estate and improvement used as a banking-house, real estate bought at judicial sales for the purpose of recovering an indebtedness to the bank, and the office furniture of the national banks, complainants herein. The statutes of Kentucky impose an annual tax of 50 cents on each share of stock, equal to \$100, in any national bank within the state. A similar tax is imposed upon state banks and corporations of loan

¹ Reported by J. C. Harper, Esq., of the Cincinnati bar.

and discount. Other corporations are assessed upon their corporate property, but stockholders are exempted from listing for taxation shares in such corporations. *Held* that, in the light of the decisions of the court of appeals construing these statutes, the corporate property of banks organized under the laws of Kentucky is not taxable beyond the tax of 50 cents per share of \$100, and that the same rule applies to the taxation of national banks; and therefore that the furniture and real estate of complainants are exempted from such municipal taxation.

2. SAME—SURPLUS FUND AND UNDIVIDED PROFITS.

When a state law taxes shares of national bank stock, it taxes the same interest of the stockholder that he would transfer on a sale of his certificate; and therefore the tax of 50 cents a share imposed by the statutes of Kentucky, as above, is a tax on the whole interest of the stockholder represented by his stock, including his interest as such in the surplus and undivided profits, as well as the authorized capital and assets of the bank.

3. SAME—FURNITURE AND REAL ESTATE.

The furniture of national banks is exempt from state taxation, because congress has not permitted it; while the real estate of such banks may be subjected to a state tax, because congress does permit it.

4. SAME—ILLEGAL TAXES—INJUNCTION.

There is no doubt of the jurisdiction and remedy by injunction in the United States courts to prevent the collection of illegal taxes upon national banks. *Pelton v. Nat. Bank*, 101 U. S. 143; *Cummings v. Nat. Bank*, id. 153.

In Equity.

Benton & Benton, for Covington City Nat. Bank.

John F. & Chas. H. Fiske, for First Nat. Bank.

Wm. Byrne, City Sol., *Mr. Roberts*, and *H. C. Whittaker*, for City of Covington.

MATTHEWS, Justice. The respective complainants in these two bills in equity are national banking associations organized under the laws of the United States, who seek to restrain by a perpetual injunction the collection of certain taxes sought to be assessed and collected by the city of Covington under the alleged authority of the laws of Kentucky. In the first case, the amount of taxes claimed by the defendant is \$10,406.62. It is made up by an assessment for the year 1881 upon the surplus fund of the bank to the amount of \$100,000; for the year 1882 on a surplus to the amount of \$127,550; for 1883 on a surplus fund and undivided profits to the amount of \$131,800; by an assessment, also, for the years 1880, 1881, 1882, and 1883 upon the real estate and improvement owned by complainant and used as a banking-house, valued at \$23,000; and by an assessment for the years 1881, 1882, and 1883 upon a piece of real estate valued at \$12,000; and upon another piece of real estate for the years 1880, 1881, and 1882, valued at \$600. Both these pieces of real estate were acquired by the bank at judicial sales for the purpose of recovering and securing an indebtedness to it. In case of the first piece, the sale was finally confirmed October 6, 1881, and the property was resold by the bank, January 28, 1882. In the latter, possession was finally obtained by a writ of possession, March 25, 1882, and the property was resold June 14, 1882. The rate of taxation upon property for city purposes during said years was \$1.85 upon each \$100 of valuation, and the amount now in controversy includes a

penalty of 15 per cent. for non-payment. In the second case, the taxes claimed amount to \$11,538.08, and are as follows: Upon surplus and undivided profits for the year 1882 to the amount of \$160,000, for 1883 to the amount of \$170,000, and for 1884 to \$174,000; upon real estate owned and used as a banking-house for each of the said years, valued at \$25,000; and for office furniture used by said bank in the transaction of its business, \$3,000; together with a penalty of 15 per cent. The capital of each of the complainant banking associations is \$500,000, divided into shares of \$100 each; and the fund described as surplus and undivided profits is the accumulation in addition to the capital stock, of which \$100,000 in each case is the surplus required by law to be reserved undivided among the stockholders; and the whole fund, it is alleged in the bills, has been invested at all times during the years mentioned, in United States bonds, treasury notes, and other obligations of the United States not taxable.

The state legislation which it is supposed authorizes the taxation complained of, is as follows: The charter of the city of Covington, by an amendment approved July 1, 1858, empowers the council to assess and collect taxes on real and personal estate, choses in action, and moneys within the city and belonging to its inhabitants, as they may designate, and such as may be taxable by the laws of the commonwealth. Annual ordinances of the council have been passed for each of the years mentioned, specifying the rate of the tax levied, and directing it to be assessed on all property belonging to the inhabitants of the city, or located therein. The General Statutes of the state, prescribing the subjects and mode of taxation for state purposes, in section 4, enumerate lands, horses, and gold watches, and other items of personal property, to be specifically listed for taxation by the assessor. The fifth section prescribes that the assessors, after having taken the lists required by the previous section, shall require each person on oath to fix the amount he is worth from all sources. After taking out indebtedness, the property described in the foregoing list, after deducting \$100, is to be listed for taxation. But it is expressly prescribed that there is not to be included in this statement and list, bank or other stock, when the bank, or other institution or corporation in which it is held, is required to pay tax on the same. Article 1 of the same act, under the caption of "Specific Taxation of Real and Personal Estate," provides for a tax on "bank stock, or stock in any moneyed corporation of loan or discount, of 50 cents on each share thereof equal to \$100, or on each \$100 of stock therein owned by individuals, corporations, or societies." It also appears that nearly all the banks of this state are specifically taxed upon their stock at 50 cents upon each share of \$100; and that in the charters of most of them this tax is declared to be in lieu of all other taxes. And, in construing and applying a provision to this effect in the charter of the Farmers' Bank of Kentucky, the court of appeals

of the state, in *Farmers' Bank v. Com., etc.*, 6 Bush, 127, said: "By a compliance with the section last quoted, the bank was to be discharged from the payment of all and every other tax. From the amplitude of the language no other rational construction can be given to it." It was accordingly decided in that case that the bank was not liable to be assessed for taxation for state or county purposes upon real estate taken by it or purchased by it in satisfaction of a debt, because "it represents the assets of the bank to its value, and is no more subject to taxation than the notes or bills held by the bank, or the money in its vaults." This seems to be the established and accepted law of the state. *Johnson v. Com.* 7 Dana, 342; *Trustees of Eminence v. Deposit Bank*, 12 Bush, 540; *Com. v. First Nat. Bank of Louisville*, 4 Bush, 101; *Louisville & N. R. R. v. Com.* 1 Bush, 255.

The state law in force imposing a tax on shares of stock in national banks, passed April 9, 1878, provides "that an annual tax of fifty cents is assessed and shall be collected on each share of stock equal to \$100 in any bank located within the limits of the commonwealth, organized under the laws of the United States, usually denominated national banks, or on each \$100 of stock therein owned by individuals, corporations, or societies;" and the cashier of each of said banks is made responsible for the due payment of the said tax into the treasury of the state. A provision precisely similar is made for the taxes imposed upon the stock of state banks and other corporations, which are required to be paid directly to the treasury without the intervention of assessor or collector. Other corporations, such as railroads, gas and water, toll-bridge, and telegraph companies, are assessed for taxation upon their corporate property. And in all such cases, when the companies are required to report and pay taxes upon their property, the individual stockholders are not required to list their shares in such companies for taxation. A comparison of the provisions of the statutes of Kentucky, in the light of the decisions of the court of appeals construing them, compels the conclusion that the corporate property of banks, organized under the laws of Kentucky, is not taxable beyond the tax of 50 cents on each share of stock of \$100, and that the same rule applies to the taxation of national banks. This conclusion exempts in the present cases the furniture and real estate of the complainants, sought to be subjected to an assessment for municipal taxation in the city of Covington, as though it were similar property owned by natural persons. Were it otherwise as to the terms of the state statutes, the furniture of the bank would still be exempt, because the act of congress, without whose permission it cannot be taxed by state authority, has not permitted it; while, on the other hand, it is equally clear that the real estate of national banks might be subjected to a state tax, because the act of congress does expressly permit it.

It is claimed in argument that a distinction is to be made in re-

spect to the surplus fund; or, at least, to that part of it denominated undivided profits, which, it is argued, represents a property interest belonging to the stockholder, subject, like other property of individuals, to taxation, and not included in the shares of stock separately taxed at 50 cents upon each share of \$100. In respect to this interest,—undivided profits,—it is argued that they do not pertain to the bank as an accumulation required by law, and therefore held in the discharge of any of its public functions so as to withdraw it from the taxing jurisdiction of the state, but that they constitute a fund in which the whole beneficial interest belongs to the stockholders, and remains undivided purely for their pecuniary benefit; and, as the existence and amount of that fund may be taken into account in estimating the value of the shares of stock for the purposes of taxation, and thus the undivided profits may be indirectly taxed, as represented by the shares, they may become the direct subject of a tax, separable and separated from the shares of stock. It is insisted that these views are supported and justified by the decision of the supreme court of New Hampshire in the case of *First Nat. Bank v. Peterborough*, 56 N. H. 38, and by that of the supreme court of New Jersey in the case of *North Ward Nat. Bank v. Newark*, 39 N. J. Law, (10 Vroom,) 380. In the first of these cases there was no controversy as to the state legislation. By one statute all shares of capital stock of banks located in that state, whether private, state, or national, were subject to be taxed, at their par value, to the owners thereof, in the town in which they reside, if in the state; otherwise, in the town where the bank was located. By another law, the surplus capital on hand, of banking institutions, was made liable to taxation in the towns where such banking institutions were located. The surplus which was involved in the controversy was net undivided profits in excess of the amount required by congress to be reserved. The tax in question in that case was upheld as not being in conflict with the act of congress; the grounds of the opinion appearing to be that the undivided profits, if regarded as the property of the bank, were not essential to the operations of the bank as an agency of the government of the United States, and that, as they might indirectly be the subject of a tax by taxing shares, not upon the par or nominal value, but upon the actual or market value, it was mere matter of form, and not of substance, to tax them directly, in addition to the tax upon the par value of the shares. In the second case, that from New Jersey, the banking association, which was located in Newark, had been assessed for municipal taxation upon its whole capital stock and surplus. It appeared that the capital stock was owned by non-residents of the state, and by residents of places in the state other than Newark, as well as by those residing within the limits of that municipality. It did not appear that the surplus had been invested in securities of the United States. The doctrine was asserted by the court, as the result of decisions by the supreme court of the United States, that

"the property merely of a corporation created by act of congress may be taxed by the states, provided such taxation be not indirectly a tax upon the credit and securities of the federal government. That this principle will apply to the undivided surplus of a national bank, and to other investments of its capital, if the same be not invested in securities of the federal government, is apparent from the cases above cited. The states possess an inherent power of taxation of such property, independently of any act of congress."

By a general law of the state, stock in national banks was taxed to their stockholders resident in the state, in the townships or wards where they respectively resided, and the bank was assessed for stock owned by non-residents of the state. A special act was passed which introduced a different rule as to banks in the city of Newark, taxing all their stock in that city, and it was held that this special act was repugnant to the constitution of the state, which required in such cases a general and uniform law. It was accordingly held to be void in respect to stockholders residing in that state, but not in Newark. Those residing in that city were held to be properly taxed there, and, as to non-residents, it was decided that the tax, though nominally against the bank, was really against them, and was properly assessed, and was to be collected through the bank. "The undivided surplus," the court adds, "not being invested in federal securities, might have been lawfully taxed against the bank, but the state law seems to contemplate that it is to be taxed in connection with the capital stock in the hands of the stockholders. It should therefore be taken into consideration in estimating the taxable value of the stock." It will be observed that under the New Jersey law the stock was taxable, not at a fixed sum per share, but on a valuation to which the general rate of taxation was to be applied. While it may be considered as settled, as was said by the supreme court of the United States, (*Railroad Co. v. Peniston*, 18 Wall. 5-33,) "that no constitutional implications prohibit a state tax on the property of an agent for the government merely because it is the property of such agent;" and, as was said in *Nat. Bank v. Com.* (9 Wall. 353, etc.,) "that the agencies are only exempt from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government,"—nevertheless it is equally true, notwithstanding any expression to the contrary in the two cases cited from New Hampshire and New Jersey, that congress, when it creates or adopts a corporation as an agency of the government for the purpose of exercising any public function, has the exclusive right to judge with what powers and privileges it shall be endowed, and how far, if at all, it shall be subject to state power or amenable to state jurisdiction, and that in case of national banks it has, in fact, withdrawn them and their property from the domain of state taxation, except so far as it has been expressly consented that they may be taxed. That consent, so far as it has been

given, is contained in section 5219 of the Revised Statutes. It does not permit taxation of any property belonging to the bank except only its real estate, as clearly appears from *Rosenblatt v. Johnston*, 104 U. S. 462. It does permit the shares in any such association to be included in the valuation of the personal property of the owner or holder of such share in assessing taxes imposed by authority of the state within which the association is located, in such manner and in such places as the state may determine and direct, subject only to two restrictions: that the taxation shall not be at a greater rate than is assessed upon the moneyed capital in the hands of individual citizens of the state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. These are the rules prescribed by congress, to which the states must conform in taxing the property of national banks, or taxing individuals on account of their interest in them. Any state taxation not within these limits is void. But, as has already been shown, the legislation of Kentucky does not undertake to subject to taxation any of the property of a national bank, not even its real estate, in respect to which congress has left it free; and, consequently, the surplus fund and undivided profits considered as the property of the bank are not subject to assessment for taxation against the bank.

It remains, then, to consider how and how far the interest of the stockholders in the surplus and undivided profits may be taxed, and whether it has been taxed to any extent by the law of Kentucky. In the New Hampshire case, *supra*, it will be observed that a tax was imposed on shares of stock at their par value, and additional tax at the same rate upon the undivided profits, and this was sustained as being in substance a tax on the shares at a value enhanced by that of the undivided profits; while in the New Jersey case the tax on the undivided profits was allowed on the same principle in estimating the taxable value of the stock, as the state law seemed to contemplate that it should be taxed in connection with the capital stock in the hands of the stockholders. The act of congress permits the taxation of the shares of the stock, but does not specify at what rate nor on what valuation. The only limitation in this respect is that the taxation upon them shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state. Subject to this limitation, it was held in *Hepburn v. School Directors*, 23 Wall. 480, that such shares might be taxed at their current market value at the place where the bank is located, even though that should be above their par value, because, as the court said, "it is not the amount of money which is invested which is wanted for taxation, but the amount of moneyed capital which the investment represents for the time being;" and this amount being the amount of moneyed capital employed by the bank, may have been increased by accumulated profits, which would give additional value to the shares

of the stockholders. So, in *People v. Com'rs of Taxes*, 94 U. S. 415, the rule of valuing the shares at their full and true value, as they (the assessors) would appraise the same in payment of a just debt due from a solvent debtor, prescribed by a New York statute, was sustained. The court said:

"The appraisement included the reserve fund, which is as much a part of the property of the bank and goes to fix the value of the shares equally as if it were not called by that name, but remained a part of the specie, bills discounted, or other funds of the bank undistinguished from the general mass."

When, therefore, a state statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits. The interest which congress has left subject to taxation by the states under the limitations prescribed, and which is a distinct, independent interest in property held by the shareholder, like any other property that may belong to him, is that interest, as defined in *Van Allen v. The Assessors*, 3 Wall. 573, which "entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of its shares, and upon its dissolution or termination to his proportion of the property that may remain of the corporation after the payment of its debts;" and (page 587) it includes for taxation the whole interest of the shareholder, such as would pass to a purchaser of his shares on a transfer of his certificate. So, when a state law taxes shares of national bank stock, it taxes the same interest of the stockholder that he would transfer on a sale. The state may tax them at their actual value or at their market value, or at any other value ascertained by some fixed rate of appraisement which does not violate the act of congress. In the present cases, the law of Kentucky imposes a tax of 50 cents on each share of \$100 of the capital stock of national as it does of state banks. Shares of \$100, intended in that legislation, is meant to describe the nominal division of the capital stock as specified in the acts and charter of organization. Speaking of this statute, the supreme court (9 Wall. 353) says:

"What the legislature intended to say was that we impose a tax on the shares held by individuals or other corporations in banks in this state. The tax shall be at the rate of fifty cents per share of \$100. If the shares are only equal to \$50, it will be twenty-five cents on each share. If they are equal to \$500, it will be \$2.50 on each share. The rate is regulated so as to be equal to fifty cents on each share."

It follows, therefore, that the tax of 50 cents a share is a tax on the whole interest of the stockholder, represented by his stock, including his interest, as such, in the surplus and undivided profits, as well as the authorized capital and assets of the bank.

Upon the question of jurisdiction and remedy by injunction, referred to in the argument, it is unnecessary to do more than refer to *Pelton*

v. *National Bank*, 101 U. S. 143, and *Cummings v. National Bank*, Id. 153.

In conformity with these views, decrees will be entered in these cases in favor of the complainants, respectively, granting the injunction prayed for.

See *Exchange Nat. Bank v. Miller*, 19 FED. REP. 373, and note, 381.—[Ed.]

CAWLEY v. JOHNSON and others.

SAME v. PETERSON.

(Circuit Court, W. D. Wisconsin. August, 1884.)

ADVERSE POSSESSION—RECEIPT OF RECEIVER OF LAND-OFFICE—WRITTEN INSTRUMENT—CONVEYANCE—WISCONSIN REV. ST. 1878, § 4211.

The receipt issued by the receiver of the land-office upon payment of the purchase price of land to the government, containing a description of the land, constitutes such a conveyance of the premises as section 4211 of the Wisconsin Revised Statutes of 1878 contemplates as a proper foundation for a 10-years' adverse possession.

At Law.

Wm. B. Jarvis and Henry C. Whitney, for plaintiff.

Thomas & Fuller, for defendants.

BUNN, J. These are actions of ejectment brought by the plaintiff, a citizen of Illinois, against the defendants, who are citizens of Wisconsin, to recover 80 acres of land lying in the county of Crawford. Defense in both cases: adverse possession for 10 years under a written instrument according to section 4211, Rev. St. Wis. To prove his title, the plaintiff introduced in evidence the receipt of the receiver of the land-office at La Crosse, for the land, issued to the plaintiff on November 16, 1854. Also a patent from the government, issued to the plaintiff on April 15, 1856, making a complete title from the United States government of the land in question, subject to the defendants' defense of adverse possession. The defendants, to substantiate their defense, introduced a receiver's receipt, in the usual form, issued at the same land-office to one French White, dated April 26, 1856, for the same land, at the price of \$100, together with an assignment of the same in writing upon the back of said receipt, and duly acknowledged and witnessed, to one J. M. Hill, dated the twenty-eighth day of September, 1857. Defendants also proved that said Hill purchased the land in good faith of White, paying therefor other lands lying in the state of Ohio, valued at \$300, and immediately went into possession of the same, and commenced clearing and making improvements, and building a house,

claiming title under his conveyance and purchase from French White, exclusive of any other right, and paying the taxes upon the land,—he and the defendants, his grantees,—and improving the same continuously for a period of 19 years and upwards, prior to the commencement of this action.

No patent was ever issued to White or Hill, or his grantees, but about the same time the patent was issued to the plaintiff, Cawley, in 1856, the entry of the land by White was canceled by the department at Washington, but notice thereof was never given to White or those holding under him, nor was the purchase money paid by White for the land returned or paid back. There is no doubt, from the evidence of Hill and the defendants, that he paid full value for the land and went into possession in perfect good faith, claiming title under the receiver's receipt to White, and the written assignment thereof to him, exclusive of any other right, and that Hill and his grantees, the defendants in these two cases, have occupied the land, breaking, fencing, building, and making other valuable improvements, and paying the taxes ever since the fall of 1857, and for a period of 27 years, to the present time, and 19 years prior to the commencement of the action; Hill occupying from 1857 to 1873, and the defendants since that time, under deeds from him,—the defendant Johnson occupying one 40, and the defendant Peterson the other.

The only question in the case is whether the land-office receipt and written assignment to Hill constitute such a conveyance of the premises as the statute contemplates as a proper foundation for a 10-years' adverse possession. This question arose in this court some two years ago in this same case, upon an objection to the introduction of the receipt and assignment in evidence, and, without much argument or consideration, it was ruled that, as the receipt was not a conveyance, and did not purport to be a conveyance, of the land, but only a receipt for the purchase price, it could not be said that the defendant entered under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question. Upon a fuller consideration of the question, I am now satisfied that my former ruling was wrong, and I am glad of this opportunity to correct the mistake in that case, now submitted with the other, upon a second trial, provided for by the statute in ejectment.

Section 4211, Rev. St. Wis., provides that—

“When the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument as being a conveyance of the premises in question, * * * and that there has been a continual occupation and possession of the premises included in such instrument, * * * or of some part of such premises, under said claim, for ten years, the premises so included shall be deemed to have been held adversely.”

And section 4215 provides that—

"An adverse possession of ten years under section 4211 * * * shall constitute a bar to an action for the recovery of such real estate so held adversely, or of the possession thereof."

I am now satisfied that the payment of the purchase price for land to the government, and the issuing of a receipt therefor by the receiver of the land-office, containing a description of the land, transfers to the purchaser a clear and complete equitable title, and an inchoate legal title, such as will entitle him to the immediate possession of the land, and enable him to protect his possession and interest by actions of trespass, waste, or ejectment; and, this being so, that the receipt is such a conveyance as is contemplated by the statute, upon which a claim of title may be founded *as being a conveyance of the premises*. If ejectment, which calls for the title, may be maintained upon the evidence of a receiver's receipt alone, without a patent, it must follow that the receipt is a written instrument under which title may be claimed *as being a conveyance of the premises*. It is primarily a question of what the law of Wisconsin is, as that must govern. The statute was borrowed from the law of New York, (see 2 Rev. St. 1829, p. 294, § 9,) from which it was transferred with only a change in the period of adverse holding,—from 12 to 10 years,—and when adopted here had already received a construction by the highest courts of that state, which must be considered as being adopted as part and parcel of the statute here.

In the case of *La Frombois v. Jackson*, 8 Cow. 589, it was held that a claim of title under an executory contract for the sale of land, the consideration being paid, was a sufficient claim of title to constitute an adverse possession; and the same doctrine was reaffirmed in *Briggs v. Prosser*, 14 Wend. 227, and in *Fosgate v. Herkimer Manuf'g Co.* 12 Barb. 352, which last case holds that when the consideration is paid, the agreement is tantamount to a deed as the foundation for adverse possession. I take it that the same doctrine must apply to a receiver's receipt, which, although not a technical conveyance any more than the other, transfers the same interest that would be conveyed by a paid-up contract, which is the entire equitable and substantial interest in the land, with an inchoate legal title, accompanied with the right, without anything further being done to a formal and technical conveyance, which is intended to constitute the final evidence and muniment of legal title, and the issuing of which is a ministerial act.

The statutes of Wisconsin make a receiver's receipt evidence of legal title, and speak of it as a conveyance. Section 4165 makes it presumptive evidence of title. Section 2235 provides for their being recorded with any assignment indorsed thereon in the same manner as other conveyances, and the definitions of the term "conveyance," contained in sections 2242 and 2326, undoubtedly include them.

In *Bracken v. Preston*, 1 Pin. (Wis.) 365, it was held "that the patent was not an indispensable muniment of title; that, as between

individuals, by the above statute (section 4165) the receiver's receipt is legal evidence of title, and that ejectment might be maintained upon it. And aside from this statutory provision, such is held by the general current of authority to be their effect at common law; that the receiver's receipt gives the immediate right to the possession, and the exclusive dominion over the land, with the power to oust any intruder by due course of law; that the purchaser, when he has paid his money and taken his receipt, has done all in his power to complete the purchase, and that the land from that time is taken from the market, and designated and set aside for the purchaser's use; that the receiver's receipt is as binding upon the government as a patent, the issuing of which is a ministerial act which conveys no new or substantial claim or interest in the land. Of course, the certificate is liable to be canceled by the government in case the sale was improperly made, but no more so than a patent. Either a certificate or patent may be recalled or canceled in case the government has previously sold the land. But the certificate, as fully as the patent, conveys all the substantial interest of the government in the land, with an inchoate legal title, which may be aliened, will descend to heirs, instead of executors, or be subject to judgments or other liens, and be sold upon execution, and the title divested or transferred in the same manner as any other legal title. See *Goodlet v. Smithson*, 5 Port. 245; *Wright v. Swan*, 6 Port. 84; *Cavender v. Smith*, 3 Greene, (Iowa,) 349; *Carroll v. Safford*, 3 How. 441; *Cavender v. Smith*, 5 Iowa, 157; *Astrom v. Hammond*, 3 McLean, 107; *Wirth v. Branson*, 98 U. S. 118; *Thomas v. Marshall*, Hardin, 22; *Stark v. Starrs*, 6 Wall. 402; *Frisbie v. Whitney*, 9 Wall. 187; *Barney v. Dolph*, 97 U. S. 652; *Copley v. Riddle*, 2 Wash. C. C. 354; *Simmons v. Wagner*, 101 U. S. 260; *Irvine v. Sim's Lessee*, 3 Dall. 425; *Lessees of Penns v. Klyne*, 1 Wash. C. C. 207.

Such being the established doctrine as to the interest in the land conveyed to the purchasers upon the full payment of the purchase price, and the issuing of the receiver's receipt, it requires no great stretch of reasoning to conclude that such receipt is, within the true intent and meaning of the statute of limitations, such a written instrument as will support the claim of an adverse possession. Under the statute, it is not essential that the written instrument should constitute, in itself, an actual title or conveyance, but only one upon which may be founded a claim of adverse possession as being a conveyance.

In *Hannibal & St. J. R. Co. v. Clark*, 68 Mo. 371, which is a case precisely like this in all essential facts, the supreme court of that state held that the statute ran upon such a receipt, which gave color of title in connection with the adverse possession of a part of the land in the name of the whole, so as to vest the title of the whole tract in the purchaser, and that the cancellation of the receipt by the department, a knowledge of which was not brought home to the pur-

chaser, did not destroy his color of title. The court also expresses a doubt whether, if such notice of cancellation had been given, it would make any difference. But neither in that case nor these is it necessary to determine that question. It is not at all a question of whether the certificate of entry *in fact* conveyed a good title, there having been a previous entry of the land by another person, but whether the statute of limitations has run upon the plaintiff's claim.

The statute of limitations being one of repose, it is simply a question whether the plaintiff, *though he had good title in the beginning*, can lie by upwards of 19 years, or within a few months of 20 years, which is the general limitation upon real actions in Wisconsin, when the adverse holding is not under a written instrument, suffering the defendants to enter upon wild and uncultivated land, grub, clear, and break it up, inclose it by substantial inclosures, build buildings and reside upon it with their families as their own, all the while claiming title in good faith under their purchase, having paid full value for the land, and the taxes from year to year during all this time, the plaintiff never so much as notifying the defendants of his claim, and then come in and say: "All this is true, but the written instrument under which you held not being a conveyance of the land, I will divest you of your interest and possession."

My conclusion is that, having failed to speak for so long a time when he might have spoken, he should not be permitted to do it now, and that there must be a judgment for the defendants in both cases.

PASCAL and others v. SULLIVAN, Collector, etc.

(Circuit Court, D. California. September 1, 1884.)

1. TARIFF LAWS—REGULATIONS OF CUSTOMS OFFICES.

The secretary of the treasury, with a view to facilitate the work of collectors of the port, may not make such regulations as would seem to negative existing laws.

2. SAME—IMPORTATION OF MINERAL WATERS—PROOF REQUIRED AS TO THEIR NATURE.

Under the laws, the importation of natural mineral waters is permitted free of duty. Under these circumstances, an importer is not restricted to a certificate of the owner of the spring in showing the character of the waters imported.

At Law.

Page & Eells, for plaintiff.

S. G. Hilborn, U. S. Atty., for defendant.

SAWYER, J. This is an action to recover an excess of duties alleged to have been unlawfully exacted by the collector of the port of San Francisco on natural mineral waters imported into the United States. Plaintiffs imported 50 cases of mineral waters in bottles

from Liverpool, England. The waters are alleged to be "natural mineral waters," and the demurrer admits the allegation to be true. The appraisers examined the goods, and determined and reported them to be natural mineral waters. The collector refused to pass them as natural mineral waters, on the ground that the certificate of the owner or manager of the spring producing them, that they were such, did not accompany the invoice, which certificate the importers represented to the collector that it was impossible to obtain. The collector, acting under the regulations prescribed by the secretary of the treasury on April 9, 1879, refused to receive any other evidence than the prescribed certificate of the character of the waters, and demanded and collected duties upon them as *artificial* mineral waters, which duties are much higher than those on natural mineral waters, the latter being free, except as to duties collected on the bottles containing them. The regulation of the secretary under which the collector acted is as follows:

"Decision 2,973, dated September 18, 1876, requires that invoices of imported waters claimed to be natural mineral waters be accompanied by certificates from the shippers that the water embraced in such invoice is in fact natural mineral water, and specifying the spring from which produced. For the better protection of the revenue against the importation of artificial waters under the name of natural waters, the certificate above mentioned *will hereafter be made by the owner or manager of the spring, instead of the shipper, as heretofore.*"

The regulation is claimed by the United States to have been adopted under the authority of section 251, Rev. St., which provides that the secretary of the treasury "shall prescribe forms of entries, oaths, bonds, and *other papers*, and *rules and regulations not inconsistent with law*, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing; he shall give such directions to collectors, and prescribe such rules and forms to be observed by them, as may be necessary for the proper execution of the law."

The only question is whether, under this provision of the statute, the secretary was authorized to make the regulation, and, being made, whether the determination that the waters are artificial mineral waters, in consequence of the absence of the prescribed certificate, is now conclusive on the rights of the importer. That the secretary cannot impose restrictions not authorized by law, was held in *Morrill v. Jones*, 106 U. S. 466; S. C. 1 Sup. Ct. Rep. 423. So, also, in *Balfour v. Sullivan*, 8 Sawy. 648; S. C. 17 FED. REP. 231. In *Campbell v. U. S.* 107 U. S. 410, S. C. 2 Sup. Ct. Rep. 759, the supreme court very clearly intimate that the regulations made by the secretary, under the assumed authority granted to him, must be *reasonable*, and, if they are unreasonable, that they will be void, and should not be enforced by the courts. Says the court:

"It would be a curious thing to hold that congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the secretary, by regulations which might be proper to secure the government against fraud, to defeat totally the right which congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid, as being altogether unreasonable."

A regulation may, perhaps, be reasonable and proper, so far as the practical administration of the office of the collector is concerned, provided the determination made by the collector in pursuance of such regulation be not conclusive on the ultimate rights of the importer. In this case, for example, to guard against frauds and to facilitate the due administration of the customs laws, it may, perhaps, be proper for the secretary of the treasury to require the prescribed certificate of the owner or manager of the spring producing the water as the only *prima facie* evidence upon which the collector shall act, thereby putting the importer who declines or fails to furnish the certificate to the inconvenience of correcting in the courts, where the means of ascertaining the truth are more efficient than any in the collector's office, any error resulting from his refusal or neglect to conform to the regulations for the government and convenient administration of the affairs of the collector's office. But whether the secretary can prescribe rules as to the character and competency of evidence that shall be binding upon the courts, or that shall conclude the rights of the importer, and, in effect, ultimately and conclusively change the rate of duties fixed by congress upon articles which may be lawfully imported into the United States, is another question. While I am not prepared to say that the regulation in question is not a reasonable one for a proper, convenient, and speedy administration of the collector's office, I do not think it was intended, or, if it had been so intended, that it was in the power of the secretary, by means of it, to make the action of the collector under it ultimately conclusive upon the rights of the importer, or to thereby, in effect, change the rate of duties prescribed by the act of congress.

If such is intended to be the effect, the rule, it seems to me, would be wholly unreasonable and void on that ground. It would empower the collector, in the guise of a rule of evidence, to change the rate of duties established by the acts of congress. It would empower him to enact, as well as administer, laws. Natural mineral waters are authorized to be imported by the act of congress without any duty whatever, except the duty required to be paid upon the bottles, as bottles, containing them. There is no other limit or restriction put upon the importation by the statute. Any one, so far as the statutes are concerned, may go into the open markets of the world, purchase natural mineral waters, and import them into the United States upon paying the prescribed duties upon the bottles containing them. But it may be impossible to obtain the certificate of the owner or manager

of the spring producing the waters, after they have been bottled, left the spring, become an article of commerce, and scattered in the trade throughout the markets of Europe and the world. And this condition of things was represented to the collector by the importer to exist in respect to the mineral waters in question. The owner of the spring might absolutely refuse to make the certificate after the waters have left his spring, and gone, as articles of commerce, into the markets of the world. It would not be in the power of purchasers in the European markets to compel such a certificate, and, in such cases, it would be difficult to procure it from the owner, even if he were willing to furnish it.

Indeed, it would seem to be impracticable to furnish such certificate. How could the owner of the spring verify the character of the water, wherever it might be found in the markets of the world, and furnish a certificate to be appended to the invoice by any purchaser desiring to import it in larger or smaller quantities? To furnish a certificate to general purchasers, at the time of sale at the springs, to be appended to the invoices by purchasers in the general markets of the world for exportation, would be to intrust the whole matter to the exporter or shipper, and this, at best, would, in effect, be but the certificate of the party shipping, and appending it to the invoice at the time of exportation, rather than that of the owner of the spring.

To establish and adhere to the prescribed rule, as conclusive in the courts of the rights of the importer, would be to enable the owners of springs to prevent entirely the exportation to the United States of any of the waters of natural mineral springs by anybody, except such as should be bought for the purpose directly from themselves, except upon payment of the much higher rate of duties imposed by the statute on artificial mineral waters, thus discouraging the importation of the pure mineral waters, and encouraging that of cheaper and deleterious artificial compounds. Under such a rule any party might well afford to pay the owner of a valuable mineral spring a large bonus to secure a monopoly, upon his own terms, of the exportation of its waters to the United States. The law itself specifically permits the importation of natural mineral waters free of duty upon the waters, and it prescribes no exclusive kind of evidence as to the character of the waters. If the secretary of the treasury can provide by rule that only a certain class of evidence of the character of the mineral waters shall be received, and that the rule shall be binding upon the courts, as well as upon the collectors in the due administration of their offices, and be ultimately conclusive upon the rights of importers, then, by a mere instruction for the guidance of collectors, he can change the general law of the land as to the competency of evidence, and indirectly abrogate the statutes permitting the importation of natural mineral waters free of duty. To require a class of evidence which is not in the power of the importer of the natural mineral waters, purchased in the open markets

of the world, to produce, would be to put an insurmountable obstruction in the way of their importation, and, in effect, deny the right, to anybody but the owner of the spring, to import at all.

While the regulation may, perhaps, be a proper one (I am not prepared to hold that it is not) for the convenient administration of the customs laws by the collectors of ports, it would be, in my judgment, wholly unreasonable to make it conclusive upon the rights of the parties when they appeal to the courts of the country to recover the excess of duties in fact exacted and paid; and, in my judgment, no authority is vested in the secretary to give the regulation any such effect. To give it such effect would be to change the law of the land as to the competency of evidence, and the statutes prescribing the rate of duties that shall be collected. If the law of the land, in this instance, can be thus changed by an arbitrary rule adopted by the secretary of the treasury, I do not perceive why it might not in like manner be changed in any other particular relating to the administration of the treasury department.

The demurrer admits the truth of the allegation of the complaint that the waters in question are in fact natural mineral waters. That being so, the duties collected are in excess of the amount required by the statute, and the plaintiffs are entitled to recover the excess exacted and paid. The rule of the secretary can furnish no defense to the action.

The demurrer is overruled, with leave to answer on the usual terms in 30 days.

AUSTRIAN v. GUY.

(Circuit Court, W. D. Wisconsin. August, 1884.)

1. MUNICIPAL CORPORATIONS—ORGANIZATION OF TOWN OF ASHLAND—WIS. REV. ST. 1858.

The organization of the town of Ashland, in Ashland county, Wisconsin, was valid and legal, although the orders of the county board in setting apart certain territory, and designating the boundaries thereof, to form said town, were not in the exact language of the statute. Wis. Rev. St. 1858, c. 13, §§ 28, 30.

2. SAME—COLLATERAL ATTACK—ACTION TO SET ASIDE TAX DEED.

Where the original orders organizing a town are invalid, after the lapse of a period of more than 10 years, the validity of such organization and its authority to levy taxes cannot be questioned collaterally in a proceeding by the alleged owner of town lots to remove a cloud on his title caused by a tax deed issued to a purchaser at a tax sale for taxes levied by such town.

At Law.

Willis & Willard, for plaintiff, with *S. U. Pinney*, of counsel.

Tompkins & Merrill, for defendant.

BUNN, J. This is an action of ejectment brought by the plaintiff, a citizen of Minnesota, against the defendant, a citizen of Kansas,

to recover certain village lots situate in Austrian's addition to the village of Ashland, in Ashland county, Wisconsin. It is stipulated that the plaintiff shows a complete title to the lots in question, subject to the defendant's defense, who claims to hold the same by virtue of certain tax deeds issued to the county of Ashland under a sale of said lots for the general state, county, and town taxes for the years 1873, 1875, and 1876, levied by the town of Ashland, in said county. It also appears that the tax deeds under which the defendant holds are fair and valid upon their face, and that the statute of limitations provided by the laws of Wisconsin for bringing ejectment to recover the lands had run upon the deeds prior to the commencement of the action on September 22, 1883.

The plaintiff, to avoid the tax deeds under which the defendant claims title, attacks the organization of the town of Ashland, alleging such organization to be invalid, and that there was consequently no authority for levying the taxes. The evidence bearing upon this issue is contained in the stipulation of the parties on file, presenting among other things, a copy of the record of the board of county supervisors of Ashland, appertaining to the setting off and organization of said town by such board. By this record it appears that the first action of the board was taken on May 27, 1872. I quote such parts of the record as bear upon this question:

"MAY 27, 1872. At a special meeting of the county board of supervisors of Ashland county, held this twenty-seventh day of May, 1872, for the purpose of organizing the new board lately elected in April last, and also for to decide and take into consideration the application of the settlers or citizens of the newly-settled portion of the town of La Pointe, now residing in Ashland and its additions, for to set off as a separate town organization, to be called the town of Ashland, in the county of Ashland, in the state of Wisconsin, the whole of the members of the new board being present, viz., John W. Bell, etc., [naming all the members of the board,] the clerk lately elected being absent, Mr. Le Montferand and Joseph Reille were appointed by the board as clerks of the meeting, to record their proceedings and decisions of the meeting, which were as follows: That after due consultation it is mutually understood, ordered, and decreed that the following described boundaries are hereby, by the action of this board, set off as a separate town, to be called the town of Ashland, and that the legal voters residing upon the lands hereby set off are hereby authorized to hold a first election to elect their respective officers on the twenty-seventh day of June for the town of Ashland, after publishing the necessary notices, according to the now-existing laws, namely, within the limited boundaries: Bounded on the south by the south line of town forty-six, (46,) on the east by the Indian reservation, on the west by Bayfield county line, and on the north by the northern line of township No. forty-eight, (48.)

"JUNE 10, 1872. At a special meeting of the county board held this tenth day of June, 1872, for the purpose of reconsidering the action of the board on the twenty-seventh day of May last, in relation to the setting off and organizing the town of Ashland, the board being all present, Mr. Le Montferand was appointed clerk *pro tem* for the purpose of recording the proceedings of this meeting.

"It appearing to the board that they have not set off sufficient territory to cre-

ate or raise a sufficient revenue to support said organization, and make the necessary improvements, etc., requisite in a new town, it is hereby ordered and decreed that the following townships be added to and annexed to the decree of the twenty-seventh day of May last, for the purpose therein mentioned, namely, townships numbered forty-five and forty-four of range four west, and that the election of the town officers be held at the store of James Wilson, in the town of Ashland, on the twenty-fourth day of June, 1872, in accordance with the decree of May 27, 1872.

"JULY 2, 1872. At a special meeting of the county board of supervisors of Ashland county, held on the second day of July, A. D. 1872, John W. Bell, chairman, John Stewart, supervisor, and Joseph Reille, clerk of the board, being present, and the meeting being duly organized, after due consideration it was ordered and decreed that the following described territory be set off as a new town, to be named the town of Ashland, viz.: Townships 44, 45, and 47, in range 4; also fractional township 48, in range 4, in Ashland county; and that the legal voters therein are hereby authorized and empowered to hold an election at the office of J. M. Matthews, in the town of Ashland, on the thirteenth day of July, 1872, for the purpose of electing the respective town officers requisite for a full town organization; said meeting to be held in accordance with the now-existing laws in regard to town organization. The action of the board this day takes precedence of all prior actions in relation thereto."

There are no further proceedings touching the organization of the town until the annual meeting, held November 10, 1874. On that day the following was had:

"The petition for the readjustment of the boundaries of the respective towns was taken up and considered. The following resolution was presented by W. R. Durfee: 'Ordered and determined, by the county board of supervisors of Ashland county, that there be, and hereby is, set off from the town of La Pointe, and added to the town of Ashland, all the following described territory, to-wit:.' [Here follows a long description of the townships set off.]

The next record is:

"MARCH 27, 1875. The county board of supervisors, pursuant to adjournment, met at the county office, March 27th, at 9 A. M. There were present, J. W. Bell, chairman; S. S. Fifield, supervisor; Chas. H. Pratt, county clerk. S. S. Fifield presented the following resolution, which was adopted: 'Resolved, by the county board of supervisors of the county of Ashland, that they do order and determine that there be, and hereby is, set off from the town of La Pointe, and annexed to the town of Ashland, the following territory, to-wit: All of township forty-three (43) north, range four (4) west; all of township forty-five (45) north, range three (3) west; all of township forty-four (44) north, range three (3) west; all of township forty-three (43) north, range three (3) west; all of township forty-five north, range two (2) west; all of township forty-four (44) north, range two (2) west; all of township forty-three, (43,) range two (2) west; all of township forty-five (45) north, range one (1) west; all of township forty-three (43) north, range one (1) west,—and the same is hereby declared to be a part of the town of Ashland, in the county of Ashland."

The next record is as follows:

"APRIL 20, 1875. Minutes of a special meeting of the board of supervisors of the county of Ashland called according to law, and held at the county clerk's office on the twentieth day of April, 1875, at 9:15 A. M. Present, W. R. Durfee, Ashland, supervisor; J. W. Bell, La Pointe, supervisor; J. H.

Shutt, county clerk. On motion of Mr. Bell, W. R. Durfee was chosen chairman for the ensuing year. The action of the board at the annual meeting held November 14, 1874, setting off certain territory from the town of La Pointe, and annexing it to the town of Ashland, was considered, and amended to read as follows: 'It is ordered and determined, by the county board of supervisors of Ashland county, that there be, and is hereby, set off from the town of La Pointe, and annexed to the town of Ashland, all the following described territory, to-wit: [Here follows a description of the townships set off.] And that all the following described territory be, and is hereby, set off from the town of Ashland and annexed to the town of La Pointe, to-wit: [Here follows a description of lands added to the town of La Pointe.] The board of supervisors of Ashland county do order and determine as follows: 'That from and after the publication of this order the town of Ashland shall comprise and contain the following townships and territory, to-wit:''' [Here follows a description of the township, with a further order describing the territory to be contained in the town of La Pointe, also.]

1. After a careful study of the above record, though there are some informalities in the proceedings, the court is of opinion that it shows the legal organization and existence of the town of Ashland, and a consequent authority to levy the taxes in question.

By the laws of Wisconsin the assessment of real estate is made between the first day of May and the last Monday in June, when the board of review meet. As will be noticed, all of the above proceedings of the county board of Ashland county, directed to the organization of the town of Ashland, or looking to a recognition by the county board of its existence as a town by virtue of any former proceedings, were had prior to the month of May, 1875, after which time the last two taxes were assessed and levied. The action of the county board of May 27, 1872, and July 2, 1872, were all prior to the levying of the first tax in May or June, 1873.

The plaintiff's objections to the legality of the organization of the town are substantially:

(1) That the various orders of the county board, looking to that end, are not in the form prescribed by law, and have no enacting clause; (2) that they are not orders proper, purporting to be in the present tense, but were recitals of what was done in the past; (3) that they do not disclose in themselves the authority by virtue of which they were made; (4) that the provisions of section 31 of chapter 13 of the Revised Statutes of Wisconsin for 1858, requiring the distribution of newspapers containing the publication of the said orders, were not complied with; (5) that the first order of May 27th does not designate the place of holding the first town meeting.

There are other objections, but these are of the substance, and all that I care to notice.

Among the special powers conferred upon county boards by section 28 of chapter 13 of the Revised Statutes of 1858, is the one "to set off, organize, vacate, and change the boundaries of towns in their respective counties. * * * And section 30 provides for the publication of all orders made under section 28. Section 29 provides that all orders and determinations by which the provisions of the next preceding section (28) shall be carried into effect, shall be in

the ordinary form of laws passed by the legislature of the state, and shall commence as follows: "The board of supervisors of the county of ——— do order and determine as follows."

In *Smith v. Sherry*, 54 Wis. 114, S. C. 11 N. W. Rep. 465, the supreme court of Wisconsin held that the above provisions, prescribing the form and publication of the order, are mandatory, and must be substantially followed. The order in that case was:

"On motion of Carl Schmidt the board of supervisors do order and determine that town 28, range 14, be attached to the town of Herman for town purposes, and that town 28, range 13, be attached to the town of Seneca for town purposes."

In that case the order was not published, and the court say that they are of the opinion that the attempt to attach the township in question to the town of Seneca, by the unpublished order and determination referred to, was ineffectual to accomplish the purpose. The court in their opinion seem to base their decision mainly upon the fact of the order not being published as required by law, which was certainly a substantial ground for the conclusion reached, and I think the decision turned upon that question, rather than on the form of the order. But they say, also, that the order passed was not in the form prescribed, but substantially different, and that it attempted to attach one piece of territory to one town and another to another town on mere motion. This is all that is said in regard to the form of the order, and whether the court, if the order had been properly published, would have held it void because adopted on the motion of a member of the board, we cannot know. I cannot think the court would have so held, provided the order had been in other respects in the form prescribed, and had been published, because these matters are usually brought up for consideration by the board in that manner, and there would seem to be no valid reason why they should not be. And in the previous case of *Hart v. Gladwell*, 49 Wis. 172, S. C. 5 N. W. Rep. 323, such an order, adopted upon motion, was held valid. The decision, of course, was made with reference to the facts of the case. Perhaps a safer objection to the form of the order in that case would be that it does not appear to have been adopted by the board of supervisors of the county of Shawano. I have referred to this decision more particularly as it is relied upon by the plaintiff as an authority in point in this case, to show that the various orders of the county board of Ashland county were invalid and ineffectual. Undoubtedly the court was right in holding that the provisions of the statute requiring a publication of the order before it should take effect, were mandatory and must be substantially complied with. Perhaps, also, the provision in regard to the particular form of the order is mandatory. If so, the question in the case at bar would be, has the statute in regard to the form of the order been substantially complied with? and if not, has the subsequent repeated recognition of the existence of the town

of Ashland by the county board cured the original defect in the order organizing the town?

It is stipulated that the orders were published, but that the copies of the papers containing such publication were not distributed by the clerk of the board to the various town clerks, as provided by section 31. But this provision the supreme court held, in *State v. Pierce*, 35 Wis. 93, directory merely, and that a non-compliance did not vitiate the proceedings. Now, let us return to the record of proceedings and look at the first order of May 27, 1872.

This record shows clearly the authority to be the county board of the county of Ashland, and the order of such board is: "That after due consideration it is mutually understood, ordered, and decreed," etc. This is certainly not a literal compliance with the form prescribed by the statute. But is it not a substantial compliance? The words of the statutory form are "*ordered and determined.*" In the order made it is "*understood, ordered, and decreed.*" If the word "understood" may be rejected as surplusage, will not the words "ordered and decreed" mean the same, and pass in the place of "ordered and determined?" The question may not be free from doubt, but would it be wise for this court to put so strict a construction upon such a statute, and to interpret it in such a literal way as to hold such an order void, when words are used of substantially the same signification? Should the word "understood" vitiate the order? I think not; and that the words "ordered and decreed," as used here, are substantially of the same import as the words "ordered and determined."

In *Hart v. Gladwell*, 49 Wis. 172, S. C. 5 N. W. Rep. 323, there was a proceeding under this same section to alter a state road running through Chippewa county, and the board of supervisors appointed a committee to view and report. The committee, instead of viewing and reporting, assumed to make the contemplated change, caused a survey to be made, and filed an order for such change, and the question was whether the action of the committee had been adopted by the board. The court, by Chief Justice COLE, says:

"The evidence as to the proceedings of the board shows that at the meeting of June 14, 1878, Supervisor Hemmelsbuck moved that the report of the road committee be accepted and the committee discharged, which motion was carried."

Here it seems the whole business was done upon motion, as in *Smith v. Sherry*, but the court held the proceeding valid, and, in commenting upon the form of the order, say:

"This may not be the language which one experienced in parliamentary proceedings would use in a resolution for adopting a report as the act of the board; but there can be no doubt that this was the intent and object of the resolution. The whole proceedings of the committee in respect to changing the road, causing a survey thereof to be made, and making an order laying out the new road, were all before the board for consideration, and were approved and adopted. It will not do to apply to the orders and resolutions of

such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body."

In this language and doctrine this court fully concurs, and, applying the same doctrine to the case at bar,—and I think it an authority quite in point, being made under the same statute by the court who has the best right to interpret it,—it seems tolerably clear that the original order of the board of May 27, 1872, was a valid order. See, also, *State v. Crawford Co.* 39 Wis. 596. As to the objection that this order does not fix the place of holding the town meeting, it is enough to say that this would not vitiate the proceedings, as the place might be designated afterwards, as was done by the subsequent orders of the county board. There is nothing in the law requiring it to be done in the same order. The act of June 10, 1872, adding more territory, is the first subsequent recognition by the board of the existence of the new town of Ashland.

The order of July 2, 1872, is, in form, substantially as that of May 27th, and is intended to take the place of the former proceedings touching the organization of the town. It is objected to this order that it runs partly in the past tense, "*was ordered and decreed*," instead of "*is ordered and determined*;" but this is, probably, a mere clerical error, as in the subsequent part of the order a return is made to the present tense, "*are hereby authorized*" in place of "*were hereby authorized*." It would be trifling to hold that mere mistakes of grammar should invalidate such proceedings. I think the order valid, but if invalid and ineffectual for the purpose of creating a town or adding new territory, it must also be invalid for the purpose of vacating a town already created by the previous order, if such town was so created.

There is less objection to the form of the subsequent orders of November 10, 1874, March 25, 1875, and April 20, 1875. Indeed, that of April 20, 1875, seems quite unobjectionable in form. It is as follows, omitting the description of territory: "The board of supervisors of the county of Ashland do order and determine as follows: That from and after the publication of this order the town of Ashland shall comprise and contain the following territory and townships, to-wit." But it is said these late ordinances do not purport to create and organize the town of Ashland, but only to assume its previous existence by adding and detaching territory, and defining its boundaries. This is true, but I think they constitute a clear and unmistakable recognition of the previous existence of such town by a body who had full legislative power to create it, and, as such, have the effect to cure any irregularity in their previous action setting off such town. *Suprs La Pointe v. O'Malley*, 47 Wis. 332; S. C. 2 N. W. Rep. 632. And if the board had power, in the first instance, to organize the town, it would probably have power, by a subsequent ordinance, to

ratify such defective organization. *Hart v. Gladwell, supra*, where the court say: "As the board had the power to grant full authority in the first instance, upon familiar principles, it might ratify and confirm the unauthorized acts of its committee, as it did do." It also appears that the existence of such town has been recognized by the state in different forms: (1) By receiving its quota of taxes for the past 12 years, and making no question in all that time of the legality of its organization; (2) by chapter 74, Gen. Laws 1883, §§ 5, 6, attaching certain territory to it, and providing for the adjustment of certain indebtedness. See *Bow v. Allentown*, 34 N. H. 351.

2. It is stipulated in the record that at the time of the organization of Ashland county only two towns existed in the territory included by the legislature therein, to-wit, La Pointe and Bayport; that the town organization of said town of Bayport ceased to exercise any of the functions of a town in January, 1867, and no town organization known as the town of Bayport has since that time exercised, or claimed to exercise, the functions of a town, but the so-called town of Ashland has exercised undisputed control over all the territory formerly comprised in said town of Bayport ever since July, 1872; that the taxes, for the non-payment of which the tax sales were made under which defendant claims title, were assessed and levied by and under the authority of certain persons, styled in such tax proceedings officials of the county of Ashland and of the town of Ashland, and said persons were at such times exercising all the functions of such officers, and claiming to be such officials, and recognized as such; that the town so attempted to be organized has exercised all the powers, functions, and franchises of a town, and been recognized as the town of Ashland by the officers of said county and the public, and has acted as a town ever since July, 1872, and all the persons acting officially in said tax proceedings exercised the functions proper to the several offices which they claimed to hold.

Under these circumstances, the question is distinctly presented whether—supposing the original orders creating the town of Ashland to be so defective and irregular as to be invalid for that purpose, in the first instance—the plaintiff, after such a lapse of time, can question the legality of the organization of the town in a collateral proceeding; and, after a pretty thorough consideration of the question, the court is of opinion that he cannot.

And without stopping to discuss the question, as this opinion is already much longer than I intended it should be, I shall content myself with referring to some of the authorities I have consulted in the examination and decision of this case.

I do not find much real conflict in the cases on this question, though none of them presume to fix any certain time after which such organization cannot be questioned collaterally, and no doubt it would be unwise if not impossible for the court to make any general rule on the subject, as each case must be governed in part by its own cir-

cumstances. In this case the town of Ashland organized under the orders of the board of supervisors, assuming to create such town, in July, 1872, and has exercised all the powers and functions of a town *de facto* since that time, and for upwards of 11 years previous to the time of the commencement of this action, in September, 1883, has all that time been recognized by the county board of supervisors of Ashland county, and by the state and public at large, as one of the towns of the state, has been for that time acting under color of law, and its existence never questioned by the state. In these circumstances it would at first view be strange indeed if a private party in a collateral proceeding could question its corporate existence.

Chapter 54, Gen. Laws Wis. 1883, passed six months prior to the commencement of this action, provides, among other things, that "every town shall be considered and held to be and to have been duly organized, which has exercised or which shall hereafter exercise the powers, functions, and franchises of a town for a period of two years;" and, further, that "the validity of any order, ordinance, or proceeding purporting to organize or set off any new town, or to change the boundaries of any existing town or towns, may be tested by *certiorari*, or any other proper proceeding brought directly for the purpose of vacating such order, ordinance, or proceeding by a proper officer or by any person owning taxable property in any town purporting to be so organized, set off, enlarged, or diminished, at any time within two years after the date of such order, ordinance, or proceeding, or within 60 days after the publication of this act, in cases wherein the two years above limited shall have elapsed prior thereto, or shall expire during said 60 days, and not thereafter. No such order, ordinance, or proceeding shall in anywise be called in question in any action or proceeding, except one brought directly for that purpose within the time above limited, and except in the case wherein such order, ordinance, or proceeding shall have been vacated by a court of competent jurisdiction."

It is objected to this act that the limitation of 60 days is invalid, as not giving a reasonable time to bring an action directly to test the validity of the proceedings. Allowing this to be so, it does not follow that the other provisions of the act are inoperative. The statute is not simply a statute of limitation. The first provision is of a curative character, which the legislature undoubtedly might make. The other provision, that no such order, ordinance, or provision shall in anywise be called into question in any action or proceeding except one brought directly for the purpose, seems to be only a legislative affirmance and recognition of the general rule of the common law on the subject as settled by the weight of authority. At any rate, it shows the legislative policy of the state upon the subject, which it is the duty of the courts to respect. See *Sherry v. Gilmore*, 58 Wis. 324; S. C. 17 N. W. Rep. 252; *Dillon, Mun. Corp.* (3d Ed.) 61; *People v. Maynard*, 15 Mich. 470; *Mendota v. Thompson*, 20 Ill. 197; *Hamilton v.*

Carthage, 24 Ill. 22; *Tisdale v. Minonk*, 46 Ill. 9; *Stuart v. School-dist. No. 1, Kalamazoo*, 30 Mich. 70; *School-dist. v. Joint Board*, 27 Mich. 3; *Rumsey v. People*, 19 N. Y. 41; *City of St. Louis v. Shields*, 62 Mo. 247; *Town of Geneva v. Cole*, 61 Ill. 397; *Cooley*, Const. Lim. (5th Ed.) 311.

In *Stuart v. School-dist.* 30 Mich. 69, which was an action brought by a private party against a school-district nominally to restrain the collection of taxes levied by the district, but really to call in question the corporate existence of such school-district, Judge COOLEY uses the following language, which seems quite applicable to the case at bar:

"To require a municipal corporation, after so long an acquiescence, to defend in a mere private suit the irregularity, not only of its own action, but even of the legislature that permitted such action to be had, could not be justified by the principles of law, much less by those of public policy. We may justly take cognizance in these cases of the notorious fact that municipal action is often exceedingly informal and irregular, when after all no wrong or illegality has been intended, and the real purpose of the law has been had in view and been accomplished, so that it may be said the spirit of the law has been kept while the letter has been disregarded. We may also find in the statutes many instances of careless legislation under which municipalities have acted for many years until important interests have sprung up which might be crippled and destroyed if then, for the first time, matters of form in legislative action were suffered to be questioned. If every municipality must be subject to be called into court at any time to defend its original organization and its franchises at the will of any dissatisfied citizen who may feel disposed to question them, and subject to dissolution, perhaps, or to be crippled in authority and power if defects appear, however complete, and formal may have been the recognition of its rights and privileges on the part alike of the state and its citizens, it may very justly be said that few of our municipalities can be entirely certain of the ground they stand upon, and that any single person, however honestly inclined, if disposed to be litigious or over technical and precise, may have it in his power in many cases to cause infinite trouble, embarrassment, and mischief."

So, also, in my judgment, are the remarks of Mr. Justice CAMPBELL in *People v. Maynard*, 15 Mich. 470, where he says:

"In public affairs, where the people have organized themselves, under color of law, into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals *before such general acquiescence*, the corporate standing of the community can no longer be open to question."

With the doctrine of these cases I fully concur, and am of opinion the like considerations are fully applicable to the case at bar.

There will be a judgment for the defendant.

KUHL v. MUELLER and another.

Circuit Court, S. D. Ohio, W. D. June, 1884.)

1. REISSUE No. 4,364—"SCHILLINGER" PATENT—CONCRETE PAVEMENTS—VALIDITY—INFRINGEMENT.

Reissued letters patent No. 4,364, granted John J. Schillinger, May 2, 1871, for improvement in concrete pavements, *held* valid and infringed.

2. SAME—"SCHILLINGER'S" CONSTRUCTION—"MUELLER AND DIETRICH'S" CONSTRUCTION.

Schillinger's invention, consisting of a concrete pavement laid in sections, with tar paper or its equivalent between the several divisions, permitting the separate removal of each block, and allowing the blocks to be severally and independently affected by varying states of the weather or changes in the temperature, and thus preventing the irregular cracking of the pavement and the cracking of the blocks, the openings resulting from shrinkage coming along the line of the joints or divisions, *held* infringed by the defendant's construction, in which the cement is laid in a solid mass, and, while in plastic state, its surface is marked off by a fish-line or trowel into blocks, the incision or marking being but a short distance into the body of the cement, and no material being interposed between the several blocks.

In Equity.

George J. Murray, for complainant.

Jere F. Twohig, for defendants.

SAGE, J. The complainant is the owner, for Hamilton county, Ohio, of reissued patent No. 4,364, granted to John J. Schillinger, May 2, 1871, for improvement in concrete pavements. The patent has been so frequently sustained by decisions of the United States courts that it is not necessary to state the reasons for holding it valid in this cause. It is sufficient to refer to the following cases: *Schillinger v. Gunther*, (Oct. 1878,) BLATCHFORD, J. 14 O. G. (U. S. Patent Office,) 713; *Same v. Same*, (May, 1877,) SHIPMAN, J. 11 O. G. 831; *Same v. Same*, BLATCHFORD, J. 16 O. G. 905; *California Artificial Stone Paving Co. v. Perine*, *Same v. Molitor*, (May 7, 1881,) SAWYER, J. 20 O. G. 813; S. C. 8 FED. REP. 821.

The invention relates, as is stated in the specification of the patent, to a concrete pavement which is laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections. The pavement is formed of concrete, of cement mixed with sand and gravel, or other suitable material, to form a plastic compound, and laid in sections so as "to allow the blocks to be raised separately without affecting the blocks adjacent thereto." The method stated by the inventor in his specification is to place between the points of the adjacent blocks strips of tar paper, or other suitable material, in the following manner: After completing one block he places the tar paper along the edge where the next block is to be formed, and puts the plastic composition for such next block up against the tar paper, and proceeds with the formation of the new block. He proceeds in this manner until the pavement is completed, interposing tar paper between

the several joints, as described. The paper does not adhere to the blocks. It forms a tight, water-proof joint, allowing the several blocks to heave separately, from the effects of frost, or to be raised or removed separately without injury to adjacent blocks. The claim is "the arrangement of tar paper, or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth." This was the second claim, but the patentee, before making the assignment to complainant under which he sues, filed a disclaimer, disclaiming the first claim, leaving only the claim above quoted.

The patent was at once recognized as valuable. Infringements were numerous. Judge BLATCHFORD states that the first infringers cut joints and fitted the spaces with pitch or asphaltum. Cement also was used to fill the joints. Joints were cut, while the material was yet plastic, with the trowel. It was held that, although the cutting was not entirely through the pavement, it was an infringement, and that it was not material whether the cut was of greater or less depth, provided that it was sufficient to prevent the irregular cracking of the pavement, which had not been accomplished prior to Schillinger's patent.

In the case of *California Artificial Stone Paving Co. v. Perine, supra*, SAWYER, J., said:

"One of the great objections to the solid concrete pavements made before Schillinger's invention was that they cracked irregularly, and one of the chief advantages of his invention, as shown by the testimony in these cases, is that the openings resulting from shrinkage come along the line of joints, and the blocks themselves do not crack, although that advantage is not set forth in the patent. In the pavements constructed by the respondents this result has been attained, and it has been admitted by the respondents in one case in this court, in which this Schillinger patent has been in question, that the object of running the trowel through at the joints was to so weaken the pavement along these lines as to control the cracking and leave the blocks as marked off unbroken. This is clearly an infringement, for the patentee is entitled to all the benefits which result from his invention, whether he has specified all the benefits in his patent or not. So, in heaving from frost and in taking up the pavement, the breakage would be likely to be along the same line."

The defendants, Mueller and Dietrich, have submitted testimony that they have not constructed concrete pavements laid in detached sections having tar paper or the equivalent between the adjoining sections, but that they have laid their pavements in a solid mass, and while they were yet plastic marked the surface with a fish-line one-sixteenth of an inch in diameter, the depth of the impression made by the line not in any case exceeding the diameter of the line; that the object in marking the pavement is to relieve the monotony of a plain surface, and to give to the pavement the appearance of having been constructed of freestone blocks. They insist that the material is not thereby divided; that none of it is removed; and that the pavement at the point of impression is actually strengthened, the particles of the material being pressed closer together by the impression

made by the string, which is stretched across the pavement and then pressed in,—generally by the use of the trowel.

The complainants submitted testimony tending to prove that the defendants cut joints with the trowel, and that the line marks were coincident with the cuts, which had been at least partially closed by cement or other material; also that the line marks, which fill with sand or dirt almost immediately, are the equivalent of the tar paper, for the reason that they control the cracking of the pavement, and limit it to the space within the line marks where it originates. The conflict in the testimony is irreconcilable, but there is in the testimony that which furnishes a means of arriving at a satisfactory conclusion, as will presently appear.

The defendants cite the case of *California Artificial Stone Co. v. Freeborn*, 17 FED. REP. 735, decided by Judge SAWYER. He says:

"It is insisted by complainant that marking off the blocks on the surface, at the time of laying the pavement, with a marker about one-sixteenth of an inch in depth, is an infringement. I am unable to perceive that the mere running along the surface of that blunt and rounded marker one-sixteenth of an inch in depth, there being no cutting elsewhere, is making a joint. I fail to see that it is an infringement."

This clearly indicates the true test. If the marking with the line be, as the defendants claim, merely ornamental, and effecting no other result than to give to the pavement the appearance of being laid in blocks or sections, it is plainly not an infringement. In the case cited, after a line of blocks had been formed and become solidified, a new block was formed, between scantlings and the block or blocks before formed, without interposing anything whatever between the new and the old blocks, and no cutting was made in the joint between the old and the new blocks. The marker was then run along the line between the old and new blocks, upon the surface. The forming of the new block against the block before formed, in the manner above stated, was according to the specifications and claim in the reissue subsequently disclaimed, and the court properly held that the marking along the line of the joint thus formed was not an infringement. But in the cases of *Perine* and *Molitor* the trowel was used to cut the pavement, while in a plastic state, into blocks, and the cuts or joints having been smoothed or floated over, so that they were not visible, a joint-marker cutting from one-sixteenth to one-eighth of an inch in depth and marking off the block was run over the line of the joints. The defendants were held to be infringers. Now, if the marker—whether it be a cord or of any other description is not material—make a cut or depression which has the effect to cause the pavement to break by upheaval, or cracking, from any cause, along the line of the cut or depression, its use is clearly an infringement. Whatever depth of cut or mark will produce the effect stated is as certainly an infringement as if the blocks or sections of the pavement were entirely separated one from another. The cutting with the

trowel, it was held, was an infringement, although it was not to the entire depth of the pavement. The difference is only in degree.

Did the line used by defendants cut joints, form blocks or sections of the pavements constructed by them, in violation of the rights of complainant? Did the defendants separate said pavement into blocks or sections by the use of the trowel? The complainant's witnesses affirm, the defendants deny, as to each of these questions; and, upon the statements of the witnesses alone, it would be extremely difficult to decide. But the exhibits produced—blocks from the pavements laid by defendants—show lines of division clear, distinct, and complete. If these were produced by the use of the marker only, it is incontestable that the use of the marker is an infringement. If they were produced by the trowel, the defendants are infringers, as has been repeatedly held. Therefore, it is not necessary to determine whether the marker only was used. The exhibits establish the fact that the pavement was divided, while yet plastic, into blocks or sections; and if that result was accomplished by the trowel or by the marker, either is the equivalent of the tar paper described in the specification of the patent under which the claimant claims.

But the defendants insist that the use of a line as a marker was known long prior to Schillinger's invention, and witnesses so testify. And counsel point to the walls of the court-room, built 30 years ago, in corroboration of the fact as they claim it. They therefore urge that if the use of the line be the equivalent of the tar paper, it is nevertheless old, and they have a right to use it; citing *Dennis v. Cross*, 6 Fisher, 138. In that case the patentee claimed the application of a spring catch and lips to the purpose of securing the *glass globe* in the bottom of the lantern, and it appeared that spring catches had been previously used for fastening the *oil-pot* in the bottom of the lantern. Judge BLODGETT held that the patent could not be sustained. There can be no doubt that the holding was correct. But that is not this case. There the use of the spring catch by the patentee was substantially the same as that known and used before his invention. Here the marker was used, it is true, before Schillinger's invention, but only upon walls for ornamental purposes, and there was nothing in such prior use that could be held to anticipate Schillinger's patent. It has never been held that an equivalent known at the date of the invention could be used without infringing the patent. Such a holding, if generally adopted, would amount, practically, to the destruction of the law of equivalents. Walk. Pat. § 354 *et seq.*; Merwin, Pat. Inven. c. 4, p. 281 *et seq.*; and chapter 7, p. 527 *et seq.*

Cutting of mortar and other plastic material with the trowel was known long before the date of Schillinger's invention, but that would not be held to be a prior use which would invalidate his patent. Schillinger was the first to produce the result accomplished by his tar paper. He is entitled, and so is the complainant as his assignee, to all means known, at the date of his patent, by which the same re-

sult can be produced, or, in the language of his claim, to tar paper or its equivalent.

A decree will be entered for the complainant for an injunction and account as prayed, with costs.

STEAM-GAUGE & LANTERN Co. and another v. MILLER and others.

(Circuit Court, D. Connecticut. September 13, 1884.)

1. PATENTS FOR INVENTIONS—IRWIN KEROSENE HAND LANTERN—NOVEL PRINCIPLE.

An important and novel principle of the kerosene hand lantern made under reissued letters patent to John H. Irwin, No. 8,598, (original patent No. 89,770,) was the supply of external air to the flame by means of deflectors, which compelled the introduction into the supply tubes, in an irreversible current of air which, but for such deflectors, would blow over and exhaust the tubes.

2. SAME—INFRINGEMENT.

Patent No. 89,770 and reissue No. 8,598 construed, and *held* to describe and claim a structure having conduits which supplied heated air when the lantern was at rest and external air when it was exposed to the wind, and which could also have the assistance, if any there might be, of heated air in introducing a flow of fresh air through the tubes. The defendant's lantern, which is an external air-feeder only, is therefore not an infringement of reissue 8,598.

3. SAME—PATENTS No. 104,318 AND No. 151,703.

Held, that defendant's lantern infringes the first claim of No. 104,318, and the second claim of No. 151,703, both patents to John H. Irwin.

In Equity.

E. S. Jenney and Benjamin F. Thurston, for plaintiffs.

Frederic H. Betts and Charles E. Mitchell, for defendants.

SHIPMAN, J. This is a bill in equity founded upon the alleged infringement of letters patent to A. R. Cribfield, dated April 2, 1867, and of the four following letters patent to John H. Irwin, viz.: Reissue No. 8,611, dated March 4, 1879, of original patent No. 73,012; reissue No. 8,598, dated February 25, 1879, of original patent No. 89,770, dated May 4, 1869; No. 104,318, dated June 14, 1870; and No. 151,703, dated June 9, 1874. The plaintiffs do not ask for a decree except upon claims 1, 2, 3, 4, 5, and 8 of reissue 8,598, claim 1 of No. 104,318, and claim 2 of No. 151,703. The first two patents are for improvements in lanterns which burn kerosene, and the third is for an improvement in the same class of lamps or lanterns.

The views of the court upon the propriety of granting the plaintiff's motion for an injunction *pendente lite* against an infringement of these patents, a description of reissue 8,598, and of the invention which it claimed, were given in *Steam Gauge & Lantern Co. v. Miller*, 8 FED. REP. 314, and in *Same v. Same*, 11 FED. REP. 718. The history of the inventions of Mr. Irwin preceding and including No. 89,770, and the views of Judges DRUMMOND and BLODGETT upon that

patent and two prior patents, are contained in *Irwin v. Dane*, 9 O. G. 642.

The lantern which was made under No. 89,770, and under reissue 8,598, was the first successful kerosene hand lantern which was ever made. It has gone into universal use wherever kerosene is employed for illuminating purposes, and has superseded all previous devices. A characteristic novel principle of this lantern, and the one which, in combination with the other parts of the device, gave it its success, was the supply of fresh or external air to the flame by means of deflectors which compelled the introduction into the supply tubes in an irreversible current of air which, but for such deflectors, would blow over and exhaust the tubes. Previous structures had supply tubes which returned vitiated air to the burner, or which furnished fresh air from protected chambers, or which furnished whatever fresh air would enter through an open funnel or bell mouth, but no previous structure furnished fresh air by the aid of injectors which compelled air, which would otherwise strike the lantern in such a direction as to exhaust the tubes, to enter the tubes in a continuous and irreversible current. Mr. Quimby, the plaintiffs' expert, correctly states this principle in this way: "The new thing consists in providing the place where the outside air enters with deflecting plates, which will insure the entrance into that place of currents of air which, but for the presence of the deflecting plates, would tend to draw air out of that place." The defendants' counsel, not admitting the value of this peculiarity of the "tubular" lantern, have proceeded, upon their part of the case, upon the theory that the device was but a modification of pre-existing devices which had supply tubes, and was not a primary invention.

While this compulsory introduction of external air into the supply tubes was an important and novel feature of the invention, and the one which gave the lantern its distinctive character, the inventor retained in his structure the tube, H, the common mouth-piece of the supply tubes, and which, as in his older lanterns, furnished, or could furnish, as opportunity offered, a supply of air heated by the burner-flame. This lantern was thus both an internal and an external air-feeder. The defendants' lanterns are external air-feeders, having elevated tubes outside the globe, disconnected with each other, and for the admission of fresh air only, and having injectors at the mouths of the tubes, which will be hereafter described.

When the lantern of reissue 8,598 is at rest, and is not blown upon by the wind, the heated air constitutes the only source of supply. When the lantern is oscillated in a violent wind, the plaintiffs insist that the heated air is necessarily expelled through the ejector, and that fresh air becomes the only source of supply for the flame.

The first question to be decided is as to the construction of the reissued patent, assuming that the lantern, when used out of doors in the ordinary way in which swinging hand-lanterns are used, is an

external air-feeder. The claims of the original and reissued patents are substantially recited in 8 FED. REP. 314. The first, second, and eighth claims of the reissue are new. The third, fourth, and fifth claims are the same as the first, second, and fourth claims of the original.

The important new claims of the reissue are the first and second. The fourth claim of the reissue, which was the second claim of the original, is the same as the first claim of the reissue, and the fifth claim, which was claim 4 of the original, is the same as the second claim of the reissue, with the exception that each of said old claims has for one of its elements, expressly stated, the tube, H. In the new claims, this tube and the supply tubes, F, F, are called feed conduits, which supply fresh air to the burner. The plaintiffs contend that the tubes, H and F, supply fresh air, and, as occasion requires, nothing but fresh air, to the flame, and therefore that the original was not enlarged by specifying that such was their office. On the other hand, if the intention of the patentee, when the original specification was drawn, was to describe and claim a lantern which was supplied by external air, aided in anywise by an ascensive current or blast of heated air, or which was supplied either from one or the other source alone, as circumstances required; and if the description and claims specified, as the thing invented and patented, a lantern which had this double source of supply,—then the first two claims of the reissue, which was issued 10 years after the date of the original patent, are to be construed in accordance with the original claims, or are to be held to be an undue enlargement of the original patent. The eighth claim specified conduits which receive the “entire supply of fresh air for the interior of the burner.”

Although the inventor said in the specification of the original patent that the deflection of the external air “would produce a current through the tubes, F, F, in the absence of any other cause,” I think that he meant to describe and claim a structure having conduits which would supply heated air when the lantern was at rest, and external air when the lantern was exposed to the wind, and would also have, in the last-named condition, the advantage, if any there might be, of a current of heated air. He meant that his patented lantern should be a structure having the cumulative advantages of internal and external air-feeding, and that his patent should be for a lantern which had heated air as an assistance in introducing a flow of fresh air through the tubes. This is shown in the following paragraph in his specification:

“It will also appear, from the above description, that there are three separate causes to produce a proper current through the tubes, F, F, to the base of the flame, viz., the ascensive force of the air heated by the burner flame, and the cooling of said heated air within the tubes; the pressure of a moving current deflected towards the mouth of the tube, H; and the centrifugal effect of swinging or oscillating the lantern. And it will be observed that either the second or third causes will always be cumulative with the first, to

produce an increased current at exactly the time when an increased supply is demanded in consequence of atmospheric disturbances in the immediate vicinity of the lantern."

It follows that the defendants' lanterns do not infringe reissue No. 8,598.

It is unquestionable that the lantern described and claimed in patent No. 104,318 is an external air-feeder only. The lantern is very similar in external appearance to that of reissue 8,598. The feeding tubes open at their lower ends into an air-chamber above the oil-pot. At their upper ends these tubes open into "the air-chamber, F," which is open at bottom and closed at top, and surrounds the upper end of the chimney. This "air-chamber" is an enlarged mouth-piece of the supply tubes, and is closed at the top so that it shall not receive any of the heated air which passes through the chimney. The chimney is surmounted by a deflecting cap and surrounded by a deflecting plate, which are separated from each other by an annular space. At the bottom of the chamber, F, are two annular deflecting plates, corresponding in diameter and relative disposition with the plates at the top of the chimney.

The first claim of the patent is for "the annular chamber or fresh-air inlets, F, arranged with a deflecting plate or plates, or their equivalents, in the manner substantially as shown and described."

The construction of the air-tubes of the defendants' lanterns is correctly described by Mr. Quimby, as follows:

"The upper ends of the elevated air-tubes are each provided with injecting devices or deflecting plates. * * * In one of the lanterns a single vertical plate extends upward from the center of the upper open end of each tube. In the other lantern there is at the top of each tube, in addition to this vertical plate, another deflecting plate, which consists of a strip of metal inserted into the upper end of the tube and occupying a plane perpendicular to the first-mentioned deflecting plate. This strip of metal is curved outwardly to the upper outer corner of the first-mentioned deflecting plate, and is then turned horizontally inward along the upper edge of the first-mentioned deflecting plate, and is soldered to the tin cylinder which forms a portion of the top of the lantern. A horizontal plate extends around the top of the lantern, and occupies a plane midway between the upper edge of the first-mentioned deflecting plates and the upper ends of the tubes; this horizontal plate being slotted immediately over the tubes, so that air striking against it is turned toward the vertical deflecting plates, and by them is turned downward into the mouths of the tubes. The metallic cylinder, which forms a continuation of the top of the globe, is provided with an ejector, which consists of a circular plate supported at some distance above the top of the upper end of the cylinder, and which is of larger diameter than the cylinder. A current of air, blowing laterally against either lantern, enters the space between the upper end of the cylinder and the circular plate, and draws air out of the interior of the globe and ejects it from under the lee edge of the circular plate. At the same time such current of air is turned by the deflecting plates into the upper ends of the air-tubes, and, being thus injected, flows down those tubes into the interior of the cone."

The question in regard to the infringement of No. 104,318 turns upon its construction. The defendants insist that the patent is lim-

ited, in its first claim, to a structure having an annular chamber which receives cold air and transmits it to the tubes, and that this receptacle must be literally a chamber. The words "fresh-air inlets" show that the office of the chamber is to admit fresh air. The receptacle of cold air which the patent calls a "chamber" is simply the common mouth-piece of the two supply tubes; and whereas, in the patent of 1869, this common mouth-piece, which was there called a tube, received both heated and cold air, it now cannot receive heated air, and receives and transmits cold air only. It is annular, because being the mouth-piece of two annular tubes and encircling the chimney, it is naturally annular, also. If this annular common mouth-piece is cut off, and air is admitted through two separate or independent mouth-pieces of two tubes, then there will be two annular chambers. The somewhat fanciful term "annular chamber" does not elevate the thing of which it speaks into anything else than the mouth-piece of two tubes. The two open ends or mouths of the defendants' tubes operate on the same principle and perform the same function by analogous means (*McCormick v. Talcott*, 20 How. 402) as the one chamber or common mouth of the tubes of the patented lantern. The defendants' deflectors are another and an equivalent form of the deflectors of the patent.

The improvement in patent No. 151,703 was mainly intended for a house-lamp, and was another application of the principle contained in No. 104,318, of supplying a kerosene lamp or lantern with cold air only, by means of deflectors which shall direct the air into the tubes in an irreversible current. The patent shows how the improvement can be applied to lanterns. In this patent one of two supply tubes are used, the common mouth-piece is dispensed with, and the deflectors are placed over the open mouth of each tube. The patentee says that his invention consisted—"First, in combining with a lamp-burner or wick-tube a surrounding air-chamber and a draught-tube, extending therefrom to a point detached from the outlet of the chimney-top, and nearly or quite as high above the flame as the outlet for the products of combustion; and, second, in combining with said draught-tube an atmospheric injector, to cause the air-currents, in whatever direction moving, to enter said air-tube and descend to the flame." The injector was composed of a number of conical shells, arranged with their bases outward and concentric with the axis of the tube. "Their effect," says the patent, "is to deflect into the tube, E, the atmospheric currents which come in contact with said plates, from whatever direction, and thus insure a current of air through said tube uniformly in one direction."

The second claim is as follows: "In combination with the burner, having the wick-tube surrounded by an air-chamber, and provided with one or more independent draught-tubes, E, the atmospheric injectors, F, at the open ends of said tubes, as set forth."

The main defense against the charge of infringement is that the de-

fendant's injectors do not receive air from whatever direction it may come, but only from some particular directions. This is a secondary patent, being an improvement upon the lantern of No. 104,723, which furnished nothing but unheated external air to the flame, the improvement consisting in placing injectors or protectors at the open upper ends of one or two tubes. I do not, therefore, give the patent the defendant's narrow construction, which is that it is limited to the particular form of protectors or injectors which are described. The defendants' protectors are one of a variety of equivalent forms which could be adopted without departing from the principle of the invention or the claim of the patent.

Let there be a decree for an injunction against an infringement of the first claim of No. 104,318, and the second claim of No. 151,703, and for an accounting, and for a dismissal of so much of the bill as relates to the Crihfield patent, and to reissues Nos. 8,611 and 8,598.

ATLANTIC GIANT POWDER Co. v. HULINGS.

SAME v. BARR and others.

SAME v. HOWE and others.

(Circuit Court, W. D. Pennsylvania. July 28, 1884.)

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF PATENT.

Letters patent No. 50,617, granted October 24, 1865, to Alfred Nobel, do not cover a capsule or percussion cap as a means of exploding nitro-glycerine.

2. SAME—REISSUE.

After a reissue of said patent, which in terms embraced a capsule or percussion cap as a means of exploding nitro-glycerine, a disclaimer of so much of the specification as described that method was filed. *Held* that, although the reissue, after being thus amended, might still bear an interpretation which would include the use of a capsule or percussion cap, yet such construction ought not to prevail in the face of the express disclaimer.

3. SAME—DISCLAIMER.

A construction of a patent amended by a disclaimer which would render the disclaimer altogether nugatory, must be essentially wrong, and cannot be accepted.

In Equity.

D. F. Patterson and Bakewell & Kerr, for complainant.

James C. Boyce, for respondent.

ACHESON, J. On the twenty-fourth day of October, 1865, Alfred Nobel obtained letters patent No. 50,617, relating to the use of nitro-glycerine as a substitute for gunpowder. On April 13, 1869, the patent was reissued in several divisions, one of which, No. 3,377, was for an improved mode of exploding the liquid. After two other surrenders and reissues, on March 17, 1874, reissue 5,798 was obtained for improvement in methods of exploding nitro-glycerine. On

June 14, 1881, a disclaimer was filed, by which certain portions of this last reissue were disclaimed and stricken out. The present suits are upon reissue No. 5,798, as modified by the said disclaimer. The plaintiff charges the several defendants with the infringement of the second claim of the reissue, which, in its present form, is as follows:

"2. The mode of utilizing nitro-glycerine as an explosive by effecting an impulse of explosion by the detonation of an explosive substance communicated to the mass under such condition as to produce an instantaneous explosion of the whole mass, substantially as described."

From one of the disclaimed paragraphs of the specification we learn that by the term "impulse of explosion" is meant "motion produced to effect the explosion by suddenly communicated force." The specification declares that "there are many ways of obtaining this impulse of explosion;" and, as it stood before the disclaimer, it particularized six different methods for accomplishing the result, the fourth thereof being in the following words:

"4. Still another method is by means of a capsule, (more commonly termed in military art a percussion cap,) which, being exploded in any convenient manner gives, by its detonation, the requisite impulse to explode the charge of nitro-glycerine."

This paragraph, however, was embraced in the disclaimer of June 14, 1881, and was thereby stricken out bodily. Now, the only mode of exploding nitro-glycerine practiced by the defendants was by means of a percussion cap. Their use of the material was in oil wells, and their method this, viz.: The charge was put in a tin shell, within the body of which, and in contact with the nitro-glycerine, was placed a percussion cap, which was exploded by dropping a weight, the explosion of the cap causing the explosion of the nitro-glycerine. The plaintiff, however, earnestly contends that such use of a percussion cap, notwithstanding the said disclaimer, is covered by the amended patent. The plaintiff's position, in effect, is that the construction of the claims is to be the same whether the discarded paragraph just quoted is in or out of the specification. Stress is laid upon the assigned reason for making the disclaimer found in the following clause thereof, viz.:

"That your petitioner is advised and believes that there is described and claimed, in said reissue, matter which the said Nobel or his assigns had no legal or just right to describe or claim, because the same was not described in said original patent."

This shows, it is said, that the act of disclaimer was not because Nobel was not in fact the inventor of the method in question of exploding nitro-glycerine, but because it was not described in the original patent. And then it is affirmed that the mode of exploding nitro-glycerine by means of a capsule or percussion cap is within the specification and claims as they stand after striking out the portions disclaimed, and, furthermore, that it is within the scope of the specification and claim of the original patent. Upon these assumed prem-

ises, and invoking the principle that the construction of a patent after disclaimer is to be the same as if the disclaimed matter had never been included in the description or the claims of the specification, (*Dunbar v. Myers*, 94 U. S. 194,) the plaintiff urges the conclusion that the explosion of nitro-glycerine by means of a percussion cap, as practiced by the defendants, infringed the amended patent.

To test the soundness of this reasoning, it will be necessary, in the first place, to resort to the original patent, granted to Alfred Nobel on the twenty-fourth of October, 1865. In the specification of that patent Nobel defines his invention in these words:

"My invention consists in the use, as a substitute for gunpowder, of nitro-glycerine, or its equivalent, substantially in the manner described hereinafter, so that the said liquid, which, when exposed, cannot be wholly decomposed and exploded, shall, by confinement, be subjected to heat and pressure, by which its total and immediate decomposition and explosion is effected."

He proceeds to explain that while, upon the application of flame, gunpowder or gun-cotton, whether under pressure or unconfined, is instantaneously decomposed in the whole mass, only that portion of nitro-glycerine when unconfined is decomposed which is directly acted on by the heat or flame. He then states that he has found that when nitro-glycerine is confined and a portion of the same is heated to decomposition, the gases evolved are at such an intense heat and subject the material to such an excessive pressure that the whole mass is decomposed almost simultaneously. He enumerates and particularly describes four different methods of exploding the material when confined, and concludes with the following claim:

"I claim as my invention, and desire to secure by letters patent, the use of nitro-glycerine, or its equivalent, substantially in the manner and for the purpose described."

This patent was before the supreme court in *Powder Co. v. Powder Works*, 98 U. S. 126, a case which, it is true, did not involve reissue No. 5,798, but in which the court was called upon to determine the scope of the original patent. And it was there declared that notwithstanding the claim in technical form might appear to be for the use generally of nitro-glycerine as an exploding agent, yet that upon a proper construction it was limited to the methods or processes of exploding the substance described in the specification. *Id.* 134, 135.

Do, then, these described methods or processes, singly or combined, embrace a capsule or percussion cap as a means of exploding nitro-glycerine? Most clearly the second, third, and fourth methods do not, for they, respectively, provide for the explosion of the material by an electric spark or current, by inserting in the liquid a thin case containing lime and water, or any substances which in combining evolve heat, or by a fuse. If a capsule or percussion cap is covered at all, it must be by the method first stated, viz.:

"*Firstly.* By exploding a quantity of gunpowder, or other substance, in contact with the liquid, (the powder being confined in a water-proof tube or

case,) the heated gases evolved from the powder, being distributed throughout the mass of the liquid, raise the temperature of the latter sufficiently to decompose the same. When powder is used for this purpose, the case containing it may be immersed in the liquid, the powder being ignited by means of a fuse, or by an electric spark. If desirable, however, the liquid may be placed in a tube, and inserted in a mass of powder, which is then ignited in any suitable manner."

Now, it is very certain that neither here, nor in any part of the specification, is there any express mention of a capsule or percussion cap; nor is anything said concerning, or the faintest allusion made to, an explosion to be effected by suddenly communicated force, or by an impulse of explosion by the detonation of an explosive substance. On the contrary, the one idea pervading the entire specification—and, as we have seen, entering into Nobel's definition of his invention—is the total and immediate decomposition and explosion of nitro-glycerine, when in a condition of confinement, by subjecting it to heat and pressure. By the plaintiff's own confession, contained in the quotation already given from the disclaimer, explosion by means of a capsule was not described in the original patent. Equally clear is it that it is altogether outside of the principle of that patent, which is explosion of nitro-glycerine, in a condition of confinement, effected by heat and pressure; whereas the capsule operates, not by heat and pressure, or by the flame produced, but by its detonation, which gives the requisite impulse to explode the substance. Thus it is seen that the very foundation of the plaintiff's argument fails.

Beyond all manner of doubt, the purpose of the reissue here was to enlarge the scope of the original specification and claim. The whole above-quoted paragraph, respecting a capsule or percussion cap, was new both in letter and in substance. But that paragraph has been solemnly disclaimed and expunged. What then? Did this disclaimer mean nothing? Was it an act at once unnecessary and vain? Surely it was both, upon the plaintiff's theory. The ingenious argument which has been made to show that the amended specification of the reissue, although not naming a capsule or percussion cap, is susceptible of a construction covering such use thereof as a means of exploding nitro-glycerine as the defendants have made, is not convincing. But were it ever so clear that the specification, as it now stands, would bear such interpretation, ought it to prevail in the face of the express disclaimer? I have no hesitation in saying that a construction which would thus render the disclaimer altogether nugatory must be essentially wrong and cannot be accepted.

But if the amended reissue covers a percussion cap, the plaintiff, it seems to me, encounters an insuperable difficulty in another quarter. The case would then be one of an invalid reissue by means of the unlawful expansion of the claim and scope of the patent, within the ruling in *Miller v. Brass Co.* 104 U. S. 350, and *James v. Campbell*, Id. 356. It is true that in Nobel's original memorandum, relat-

ing to his invention, on file in the patent-office, he mentions a capsule as a means for effecting the explosion of nitro-glycerine. But he deliberately omitted it from his specification as ultimately framed, and such omission must be held to be either an abandonment of its use to the public, or an irrevocable declaration that as a means of exploding nitro-glycerine it was not his invention.

Let decrees be drawn in these several cases dismissing the bills, with costs.

DEIS v. DOLL.¹

(Circuit Court, N. D. Ohio. September, 1884.)

PATENTS—EGG-BEATERS.

Patent No. 254,540, granted to Charles Deis for an improved egg and sugar beater, consisting of a box or receptacle containing a revolving shaft, on which "are set a number of projecting whips or beaters of wire, either in bunches or singly, and in rows or alternately," *held* that, in view of the state of the art at the time the patent was granted, it must be limited to the combination described, embracing the particular form of beater shown in the specifications and drawings; and that it is not infringed by a beater in all respects like Deis', except that, instead of wire whips, it has, on the revolving shaft, rigid cast-iron projections arranged in four or more parallel rows, these radial arms being so arranged in each row as to be intermediate with those of the other, and the arms on each row connected at their outer ends by longitudinal stiffening rods; said beater being manufactured by defendant under patent No. 266,679, granted to him.

In Equity.

Charles F. Morgan, for complainant.

M. D. Leggett and John Crowell, for defendant.

MATTHEWS, Justice. This is a bill in equity to restrain the alleged infringement by the defendant of letters patent No. 254,540, granted to the complainant, March 7, 1882, for certain improvements in egg and sugar beaters, and for an account.

"This invention," the specification declares, "is intended for the use of bakeries, where large quantities of eggs and sugar and flour are beaten for cake-making, etc., the object being to supply a cheap and simple machine that will do the work in a much shorter time than by hand-beating, as generally practiced; and the invention consists in the employment of an open box or receptacle, with a rounded bottom, and having hollow (tin) or double side walls, to contain hot water therein, to aid the beating by warming the egg mass in the box, so that it works quicker, and combined with a revolving shaft having a series of projecting whips or dashers thereon, which is operated by gear-wheels and a crank outside the end of said box, all substantially as hereinafter fully explained."

Having reference to the drawings, there is a description of the box,

¹ Reported by J. C. Harper, Esq., of the Cincinnati bar.

with rounded bottom and hollow sides, to hold hot water, and set in that a beater, consisting of a horizontal shaft removable therefrom, and revolved by means of a cog-wheel and crank at one end of the journal outside the box. "On this shaft," the specification proceeds, "are set a number of projecting whips or beaters of wire, either in bunches or singly, and in rows or alternately in position, which, when rapidly revolved by the crank, beat up the mass of egg or eggs and sugar and flour, in a very short time, to the required lightness and consistency, giving the same effect as rapid hand-beating."

The claim is as follows:

"In a baker's egg and sugar beater the combination of the shaft, *d*, having the wire whips, *i*, *i*, *i*, thereon, operated by cog-wheels, *f*, *g*, and crank, *h*, with the box, *aaa*, having the rounded bottom, *a*, and double walls, *b*, *b*, (and bottom,) all arranged and operating substantially as specified."

The defendant's answer, specially naming the alleged anticipation, denies the validity of the patent for want of novelty, and also the alleged infringement. It is admitted that the defendant had manufactured and sold one or more machines, in all respects like those described in the letters patent of the plaintiff, with this exception: that instead of the wire whips projecting from the shaft, as a beater, they had, on the revolving shaft, rigid cast-iron projections, arranged in four or more parallel rows, these radial arms being so arranged in each row as to be intermediate with those of the other, so that each arm cuts a separate path through the material to be mixed, and the arms in each row connected at their outer ends by longitudinal stiffening rods, which impart rigidity to the entire row of arms. The defendant claims the right to manufacture and sell machines of this character by virtue of letters patent for the same, issued to him October 31, 1882, and that they do not infringe the letters patent of the plaintiff; or that, if they do, the latter are void for want of patentable novelty. The defendant's patent, No. 266,679, is for new and useful improvements in egg and flour mixers, and, after describing in the specification the details of the machine with reference to the drawings, sets forth claims to a combination, consisting of a jacketed mixing trough, having hollow sides for hot or cold water; a horizontal detachable beater, having rows of radial arms, connected by longitudinal stiffening rods at their outer ends, and means of revolving the beater. The supposed advantage of the radial arms, constructed and arranged as described, is set forth in the specifications as follows:

"In revolving the beater the radial arms of the same agitate the materials placed in the trough, while the longitudinal stiffening rods move closely along the inner walls of the trough, so as to take up the materials deposited thereon and return them into the path of the radial beater-arms, whereby the thorough mixing of the eggs, sugar, flour, or other materials is secured in a very short time, and a dough of the required consistency and lightness obtained."

The advantage and superiority of radial arms so arranged, and united by stiffening rods, are admitted; but it is contended that, if

patentable, they can be only as an improvement upon those covered by the plaintiff's patent, for which, in other respects, they are merely mechanical equivalents; that patent, it is claimed, covering, as a constituent of the combination, every horizontal shaft with projections suitable for beating eggs and sugar, etc. There is no claim for the beater alone, but only in this combination; and in every other respect, except as to this beater, it is admitted that the combination itself, in other applications, and all the several elements which enter into it, were well known and in common use before the alleged invention of the plaintiff. For example, it is admitted that prior to that date churns were made and sold, and in public use, having rounded bottoms and double walled sides for holding hot or cold water, and provided with revolving dashers and mechanism adapted to revolve them, although such dashers were not suitable for beating or treating eggs, or eggs and sugar, or like masses. There is also in proof, letters patent granted to John F. Robe, No. 166,412, dated August 3, 1875, thus antedating those of the plaintiff several years, for an improved egg-beater, in which there is shown a rotating horizontal shaft, with radial arms or prongs projecting from the shaft, operating between like bars in a fixed position, turned in a casing, without, however, the double walls, by means of a crank and cog-wheel. There was certainly nothing patentable in employing such a beater as that of Robe's in a casing having hollow sides; and having in view, therefore, the state of the art at the date of the plaintiff's alleged invention, and by means of that seeking to reconcile the action of the patent-office in granting the two patents,—one to the plaintiff, the other to the defendant,—otherwise inconsistent, it is necessary to limit the patent of the plaintiff to the combination described by him, embracing the particular form of beater shown in the specifications and drawings.

This relieves the defendant from the charge of infringement, and entitles him on that ground to a dismissal of the complainant's bill, with costs; and it is so ordered.

THE HEROE.

(District Court, D. Delaware. August 11, 1884.)

1. SEAMEN'S WAGES—STIPULATIONS—DISCHARGE.

Where seamen were employed on a steam-boat to make the run from Philadelphia to Port of Spain for a stipulated sum, and to have their passage paid on their return to the port of departure, and the vessel, after having gone a short distance to sea, was compelled to put back, and some of them were discharged by the captain because he had no further use for them, *held*, that they were entitled to be paid the full sum agreed upon for their wages.

2. SAME—LEAVING VESSEL—SEAWORTHINESS.

Two of the libelants having left the vessel on the ground that she was not seaworthy, *held*, that unseaworthiness justifies a crew in leaving a vessel, and

entitles them to the payment of their wages for the month or voyage; and that the discharge of seamen and unseaworthiness may be proved in the same manner as other facts are proved before a court or jury.

3. SAME—STATUTORY PROVISIONS.

Statutory provisions relating to the discharge of seamen, and the holding of surveys on vessels alleged to be unseaworthy, are not exclusive of other remedies than those therein contained.

In Admiralty.

Bradford & Vandegrift, for libelants.

John M. Arundel, for claimant.

WALES, J. Libel for wages and damages. The libelants shipped on board the *Heroe*, bound from Philadelphia to Port of Spain, in the island of Trinidad,—two of them in the capacity of quartermasters, two as firemen, and the remainder as seamen,—and they were to be paid for the run, \$50, \$45, and \$40, respectively, and on their arrival at the port of destination were to have their passage paid to Philadelphia or New York. The *Heroe* is a side-wheel steam-boat, designed principally for river navigation, and this was her first voyage. She is of 102 tons burden, 110 feet long and 26 feet beam, provided with a single engine and a single furnace. The furnace was constructed for burning wood, but was temporarily adapted for the consumption of coal. She left Philadelphia on July 6th, last, with a crew of 14 all told. She was about 24 hours in making the breakwater, and after a short delay for some slight repairs to the machinery, put to sea and had gone as far as off Cape Hatteras when she was compelled to come to anchor for further repairs to the engine. Before reaching Hatteras it was found necessary to stop the engine every few hours to clean the fires. By this time, also, it had been discovered that the machinery worked badly, and the vessel could not make more than three and a half or four knots an hour. After repeated efforts to put the engine in good working order, and more than one unsuccessful attempt to proceed on the voyage, the vessel at one time having lost steerageway, becoming unmanageable, and the stock of coal being considerably reduced, it was decided to turn back and make Philadelphia or the nearest port. The *Heroe* had first arrived off Hatteras on July 10th, and returned to the breakwater on July 17th. Waiting here and at Cape May for orders from the owners, she was finally brought to Delaware City on July 26th. Between Cape May and Delaware City the three lower tiers of tubes of the boilers gave out, and the crown-sheet was split for the length of six inches. The steam-boat was provided with sails, but it was not pretended that they were sufficient for her navigation. The captain surmised that by removing the paddles he might have proceeded under sail. At Delaware City the two quartermasters left the vessel on account of her unseaworthiness, and on the ground that the voyage had been broken up and abandoned, and being refused payment of their wages filed their libel. Subsequently the firemen and seamen filed their libel for wages, alleging that the captain had discharged them. By agreement of counsel the testimony taken under

the first libel applies to the second, and both have been consolidated. I entertain no doubt of the fact of the discharge of the firemen and seamen. The testimony of the libelants establishes the fact, and the captain admitted to the marshal that he had no further use for the men; that they were at liberty to go; and he permitted them to take their effects from the vessel. The answer denies that the men were "regularly" discharged, but the proof is too clear for discussion that they were virtually and practically discharged, and a decree will be entered for the payment of their wages as stipulated in the shipping articles, less advances and credits. I have not been satisfied that they are entitled to any further compensation or damages. It is true, they expected to make the run out and return before August 1st, but they have not suffered a long detention.

The case of the quartermasters turns on a different question, to-wit, the unseaworthiness of the *Heroe*, and the deviation from and abandonment of the voyage for which they were engaged. They do not allege that the captain discharged them. The answer specifically denies unseaworthiness or abandonment, and claims that the *Heroe* was brought back to Delaware City "for the purpose of having her steam-engine put in proper order and repair, so as to enable said steam-boat to resume or proceed on her voyage to said Port of Spain," etc., "which repairs, as respondent has been informed, will be completed on or about Tuesday next, the fifth instant." "Seaworthiness implies the ability of a ship or other vessel to make a sea voyage with probable safety; that is, that she shall be tight, stanch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage." *Bouv. Law Dict.* Confining the inquiry to the fitness of this vessel to make the run from Philadelphia to the island of Trinidad, a distance of 2,300 miles, the testimony, not alone of the libelants but of the captain and chief engineer, is conclusive. The vessel is well built for one of her class, and her officers appear to be experienced and competent, but there was such a defect in her machinery, owing to faulty construction, or the ill adjustment of its various parts, that the chief engineer reported at the time when it was decided to turn back that he could do nothing with the engine. The experiment of sending such a vessel on a voyage of 2,000 miles was somewhat hazardous, and the refusal of these libelants to stand by her is not remarkable. The vessel was altogether dependent on her engine for propelling power, and when that failed from faulty construction, or by reason of the negligence or want of skill on the part of the owners, the vessel could no longer be considered as fit for the voyage for which she was intended. A rotten or leaky hull or broken masts are no greater evidences of unseaworthiness than is a defective engine, under the circumstances surrounding this case. The libelants shipped on the *Heroe* on the faith that she was in all respects well found and provided as a steam-boat should be, and when they had good reason to believe that she was

a failure, and that their lives would be endangered by again going to sea in her, their conduct in leaving cannot be considered as censurable. It is quite probable that the machinery may be rectified and made to work as originally designed, and the vessel ultimately reach its destination, but in the mean time are the libelants compelled to remain on board indefinitely, without additional compensation, and to forfeit their stipulated wages unless they make the run to Trinidad? Had the steam-boat encountered storms or head-winds, and her voyage been delayed by these or other perils of the sea, the libelants must have been without warrant or justification for their action, and it would have been their duty to remain on the vessel until the voyage was ended. But this is obviously a different case. She was not thwarted by the elements, but by reason of her own inherent defects. The engine and boiler of the *Heroe* will require considerable repair and alteration before she is fit for sea, and the evidence affords no satisfactory information when these repairs will be completed.

I think this vessel was unseaworthy from the facts already stated. The chief engineer testified that the air-pump was too small, and that the draughtsman of the machinery had made a mistake as to its size. The engine worked stiffly and slowly, being new and untried. The speed never exceeded, if it reached, five knots an hour. The furnace was not intended for wood-burning, and before the officers had decided to put back to the Delaware there was not coal enough left to carry her to Bermuda. The sails were not sufficient for her navigation, and had she met tempestuous weather the lives of the crew would have been imperiled, and probably lost.

It is not denied that unseaworthiness releases a crew, and that they become entitled to their full wages for the month or for the voyage; and, if by the month, then for the time they served, with the allowance of a reasonable time for their return to the port of departure.

The objection made by respondent's counsel, that this court cannot entertain jurisdiction of the libels because these libelants have not complied with certain provisions of the acts of congress relating to the discharge of seamen and to the holding of surveys on ships alleged to be unseaworthy, comes too late. The case has been heard on its merits. The discharge and the fact of unseaworthiness can be proved at any stage of the proceedings. Besides, the statutes referred to are not exclusive of other remedies.

It is not necessary to consider the question of abandonment of the voyage.

A decree will also be entered for the payment of the quartermasters.

Authority for the positions taken will be found in 3 Kent, Comm. 187, 204, 205; *Work v. Leathers*, 97 U. S. 379; *U. S. v. Nye*, 2 Curt. C. C. 225; 1 Abb. Adm. 409; 1 Pars. Adm. Law, 47; *Bray v. Atlanta*, Bee, 48; *The Cyrus*, 2 Pet. Adm. 407; *The Frank C. Barker*, 19 FED. REP. 332; *The Edward*, Blatchf. & H. 286.

BLOCK v. ATCHISON, T. & S. F. R. Co.

(Circuit Court, E. D. Missouri. September 17, 1884.)

1. PRACTICE—JURISDICTION—SECTION 1 OF ACT OF MARCH 3, 1875, CONSTRUED.

Where a railroad corporation organized, and, having its road in one state, has an office in another for the purpose of soliciting business, and has an agent in charge of such office, employed for the purpose of furthering the business of the company in the state in which its road runs, it may be sued in the district where such office is located, and is to be considered "found" in such district, within the meaning of section 1 of the act of March 3, 1875, concerning the jurisdiction of circuit courts.

2. SAME—SERVICE OF PROCESS.

In such cases, service of process upon the agent in charge of the office is valid.

Plea to the Jurisdiction.

This is an action for an injury alleged to have been received in Kansas through the negligence of defendant, a Kansas corporation. The defendant's road does not extend into Missouri, but it has an office in both Kansas City and St. Louis. The service in this case was upon the officer in charge of the company's office at the latter place. The defendant claims in its plea that the court has no jurisdiction for the following reasons, viz.: Because it is not an inhabitant of or found within this district, within the meaning of the act of congress; because no part of its road was or is in the Eastern district of Missouri; because the cause of action did not accrue in Missouri; and because the defendant did not keep, at the commencement of this suit or service of writ, an officer or agent for the transaction of its usual and customary business in this district, within the meaning of the laws of the state of Missouri and the acts of congress, and therefore cannot be sued in this district; because the agent served was not such an agent as could be legally served with process against this defendant.

Dyer, Lee & Ellis, for plaintiff.

James Hagerman, for defendant.

BREWER, J., (*orally*.) I have well-settled convictions in reference to this matter, because I have had this question of service on foreign corporations before me in two or three districts. True, it was presented in different phases; but I have had occasion to fully examine the question. In Kansas we have a statute that authorizes service upon railroad corporations by delivering process to an agent who sells tickets; and in one case I had before me, service was attempted to be made on the Chicago, Burlington & Quincy Railroad Company by serving an agent of the Kansas City, St. Joe & Council Bluffs Railroad, on the claim that he was in the habit of selling coupon tickets over the Chicago, Burlington & Quincy Railroad, and

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

therefore, as he had been doing that several years, and those tickets had been recognized by the Chicago, Burlington & Quincy Railroad, he was the agent of that road to sell tickets. I set aside that service, because I thought the act extended only to agents who were direct agents, and he was a mere subagent, and only authorized to receive service as the agent of the St. Joe & Council Bluffs Railroad, the corporation by which he was directly employed, and to which alone he accounted. There is a case later than those spoken of by counsel, which, if my memory serves me right, went to the supreme court of the United States from Michigan, where, under a statute authorizing service on the president or chief officer of a corporation, service was made on some chief officer of an eastern corporation who was simply passing through the state; and, whatever court decided it, it was held that the corporation was not found in the state unless it had an office there for the transaction of business in the state, and that the mere temporary traveling of an officer through the state did not locate the corporation there. That applies to the case which was decided by the court this morning, where service was had on a traveling salesman, who, for all the return disclosed, was merely traveling through the state, and therefore was not a sufficient service.

But, in this case, this corporation defendant has established a business office here, and has an agency. It does not run its railroads here, carry passengers, or transport freight within this district, but it has an office here for the purpose of soliciting business, and has an agent here,—not a subagent, but a direct agent,—employed for the purpose of furthering the transportation business of the corporation in the states where its road runs; the same as various manufacturing and insurance corporations have offices established in different cities for the purpose of extending their business; and, wherever they have an office established, an agency is created. It seems to me that, within the purview of this statute, the corporation is found wherever such an office and agency is established.

In this particular case it is perhaps a hardship in bringing the suit here, since the cause of action arose, the injury was done, in the state of Kansas; yet, on the other hand, if a contract was made here by their agent, there would be, under some circumstances, very just ground for saying that this was the place for litigating any question arising thereunder. If freight had been transported, and a dispute arose afterwards as to the terms of the contract, here would be the place where it was made; here would be the place where the rates of freight were proposed and accepted, and there might be great propriety in having the litigation here. So, where an insurance corporation of some eastern state enters into an insurance contract here, any litigation in case of loss ought to be had here, and the insured ought not to be compelled to go to the state where the corporation exists for the purpose of establishing his demands. A very wise line of demarkation might be that where a suit is brought

against a corporation outside of the state where it exists in the first instance, the litigation should be limited to such contracts as are made at the place where the suit is commenced. But, as the statute now is, if the corporation is found here for the purposes of any suit, it is found for the purposes of all suits. It seems to me, within the purview of the statute, that wherever a railroad corporation has established an agency, where it has an office, an agent directly employed by it for the transaction of its business, (and that is not limited to the mere business of running its road, carrying freight and passengers, but includes any transactions or contracts with the view of increasing or furthering such regular business,) in such case it is found within the district. I do not think the section referred to by counsel as to the jurisdiction of the circuit court, in a state in which there are two districts, has any application to this case, for here the defendant is a corporation of another state, and therefore not any more a resident of one than the other district in this state. The plea to the jurisdiction will be overruled.

BISCHOFFSHEIM v. BALTZER and others.

(Circuit Court, S. D. New York. September 9, 1884.)

PRINCIPAL AND AGENT—INTEREST ON MONEY RETAINED BY AGENT—RATE OF INTEREST—LAW OF PLACE.

Money, voluntarily left by a principal in the hands of an agent, lies without interest until some request for it or occurrence changes the character of the detention; but when the detention is against right, interest from the time when the money should have been paid to the principal, at the rate fixed by the law of the place where it is detained, is chargeable to the agent.

In Equity.

Joseph H. Choate, for orator.

Chas. M. Da Costa, for defendants.

WHEELER, J. There having been an order for a decree setting aside the basis of a charge by the defendants to the plaintiff of \$63,125, in an account current, as paid for \$100,000 North Carolina state bonds which proved to be void, and for a resettlement of the account, several questions have been made as to carrying out the decision made. *Bischoffsheim v. Baltzer*, 20 FED. REP. 890. As this is the only item open, it can be adjusted on its own merits, and the balance due ascertained without reference to a master, so far as appears to be claimed.

Firstly, this charge was made following sales of gold made by the defendants for the plaintiff, and the proceeds credited to a larger amount than this charge, so that gold furnished by the plaintiff may be said to, in effect, have paid for the bonds. It is urged, if the ar-

gument is understood, that on setting aside the charge the plaintiff is entitled to what would replace so much of the gold as would balance the charge. There would appear to be much plausibility in this claim if the transaction had been that the defendants swapped the bonds to the plaintiff for the gold. But in fact the plaintiff made no trade with the defendants for the bonds. The defendants charged the plaintiff so much as paid out for the bonds. The plaintiff, supposing that the money was actually so paid, let the charge stand for the amount. The other transactions were separate from this, and would have taken place if this had not. This charge did not increase or diminish the amount of gold bought or sold. It diminished the plaintiff's credit with the defendants exactly as much in money as the amount of the charge. Exactly that amount of money would have made the plaintiff whole in respect to this charge, at that time. The amount is the same now, unless interest is to be added.

The account shows that interest on balances was carefully computed from time to time covering this period. By the making of this charge the plaintiff lost the interest on its amount to the closing of the account. Had the charge not been made, his interest would have been enough more, and the defendants' enough less, to amount to that. So, by understanding and contract, the plaintiff is entitled to interest on the item, or rather on the amount which balanced it, unless there is something in the transaction and what followed to repel such allowance. There is no doubt, probably, but that, as claimed for the defendants, money voluntarily left by a principal in the hands of an agent lies without interest until some request for it, or occurrence, changes the character of the detention. Neither does there appear to be any question but that whenever the detention is against right interest follows. *Stone Cutter Co. v. Windsor Manufg Co.* 17 Blatchf. 24.

The question here is as to the character of this detention. The void bonds were the defendants' bonds. There was no sale from the defendants to the plaintiff. The plaintiff had the right to treat the transaction as a sale to his firm when he knew what it was, but never has done so. The defendants kept the money themselves, as the price of their bonds, and represented that they paid it to others for the purchase of others' bonds. They had the bonds all the while. They detained the money against the right of the plaintiff all the while, but he did not know it. His right did not accrue with his finding out; he found out a right already accrued. When he found out his right, he might, it is true, have waived it; but his failure to waive it did not create it, but saved it. It appears to have been saved as it was in the beginning, and as it would have been if it had been asserted then,—a right to the money which the charge met, with interest. The money was detained in New York, and the law there as to the rate of interest must govern. *Ekins v. East India Co.* 1 P. Wms. 396. This seems to be settled at 7 per cent. while the legal rate

was 7, and at 6 while the legal rate was 6, by the decisions of the highest court of the state. *Reese v. Rutherford*, 90 N. Y. 644; *Sanders v. L. S. & M. S. Ry. Co.* 94 N. Y. 641; *O'Brien v. Young*, 95 N. Y. 428. It is suggested that objections to evidence should be passed upon formally before entry of decree; but there is no motion to suppress testimony, nor any question raised by objection that the decision of would be controlling upon any principal point. There is no occasion to pass upon such questions in detail.

Decree entered accordingly.

NEW CASTLE NORTHERN RY. CO. v. SIMPSON.

(Circuit Court, W. D. Pennsylvania. August 13, 1884.)

1. RAILROAD COMPANY—CONTRACT *ULTRA VIRES*—RESCISSION—PART PERFORMANCE.

A court of equity, upon a bill filed by a corporation, will rescind a contract still executory into which it has entered, where the same is *ultra vires* and against public policy, although all the stockholders may have either expressly assented thereto or acquiesced for a season therein, and in its partial execution by the other party.

2. SAME—CONSTITUTION OF PENNSYLVANIA—CONTRACT TO CONSTRUCT RAILROAD.

The constitution of the state of Pennsylvania provides that "no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." An incorporated railroad company of that state entered into a construction contract whereby the contractor agreed to furnish all the materials and do all the work necessary to construct the company's road, at an expenditure, however, not exceeding \$200,000; and in consideration thereof the company agreed to issue to the contractor \$300,000 of its capital stock as fully paid up, and \$300,000 of its first mortgage bonds. The materials could be furnished and the road built for \$180,000 cash. *Held*, that the contract contravened the constitutional provision, and was *ultra vires* and void.

3. SAME—PENNSYLVANIA STATUTES OF APRIL 4, 1868, AND APRIL 18, 1874.

The act of assembly of April 4, 1868, limits the amount of a railroad company's construction mortgage bonds to the amount of the capital stock subscribed, and authorizes the issue of such bonds in amounts not exceeding double the amount actually paid up of the capital stock subscribed; and the act of April 18, 1874, forbids any corporation to increase the amount of its indebtedness beyond the amount of its capital stock subscribed, until the amount of its capital stock subscribed shall be fully paid in. *Held*, that the performance by the railroad company of its said contract involved a violation of these statutory provisions, it appearing that no part of its subscribed capital stock, which was \$250,000, had been paid in.

4. SAME—PART PERFORMANCE BY CONTRACTOR—COMPENSATION.

Before the bill was filed the contractor had entered upon the work of construction, and he has expended upwards of \$40,000. *Held* that, while the contract must be rescinded as one which the corporation had no lawful power to make or perform, yet the rescission should be upon terms securing to the contractor just compensation, his conduct being free from actual bad faith.

In Equity.

R. B. McCombs, Frank Whitesell, and J. B. Brawley, for complainant.

J. H. McCreary, D. B. Kurtz, and Marshall Brown, for respondent.

ACHESON, J. The purpose of this bill, which was filed on December 15, 1883, in the court of common pleas of Lawrence county, is the rescission of a construction contract between the plaintiff (the New Castle Northern Railway Company) and the defendant (Thomas P. Simpson) on the ground that it was beyond the powers of the plaintiff company to enter into such contract or fulfill its terms, it being against public policy and in violation of the state constitution, and its execution involving also an infraction of certain statutory enactments. The plaintiff company was incorporated under the laws of Pennsylvania on the first day of February, 1883, with power to construct a railroad in Lawrence and Mercer counties, the articles of association fixing the capital stock at \$250,000, in shares of \$50 each. This capital stock was all subscribed for by nine individuals, but it has never been called in, nor has any part thereof been paid. On May 25, 1883, at an irregularly called stockholders' meeting,—30 days' newspaper notice only having been given, instead of 60 days' notice, as required by law,—it was resolved that the capital stock be "increased to \$30,000 per mile."

On the fifth day of October, 1883, the plaintiff and defendant entered into a written contract whereby the defendant agreed to furnish all the materials and do all the work necessary to construct the railway of said company from the junction with the Pittsburgh & Lake Erie Railroad, in the city of New Castle, in Lawrence county, to the town of Middlesex, in Mercer county, Pennsylvania, a distance of about 16 miles, with sidings and branches 2 miles in length; and in consideration thereof the plaintiff agreed to pay and deliver to the order of the defendant, from time to time, as required by him, its capital stock and first mortgage bonds at the rate of \$30,000 in full-paid capital stock and \$30,000 at par of first mortgage bonds, for each and every mile of track constructed under the agreement; the contract, however, expressly providing that the sum which the defendant was to expend was not to exceed \$200,000.

According to the terms of the contract, its fulfillment would require the delivery by the company to the defendant of \$540,000 of paid-up capital stock, and \$540,000 of first mortgage bonds; but by a separate instrument of writing, bearing the same date, the defendant assigned \$480,000 of these securities, viz., \$240,000 of bonds and \$240,000 of stock, to two of the directors of the company, in trust, to be used in paying for rights of way, etc. The evidence warrants the conclusion that the *bona fide* cash expenditures to be covered by this trust would be greatly less than the nominal value of the assigned securities, and that one main purpose to be subserved by the trust arrangement was the securing to certain directors and promoters of the company large profits out of the right of way, which, for the most part, was located upon the bed of an abandoned canal which these

parties had purchased for the company at a low price. It is, however, due to the defendant to say that he had no personal interest in these proposed illegitimate gains. A construction contract of the same general character had previously existed with one W. W. Reed, but, by agreement, it was canceled on or about October 5, 1883, Simpson paying \$5,347.43 for work, etc., done under it.

On October 23, 1883, in order to obviate objections raised by some of the directors of the company, the defendant executed an instrument whereby he agreed to certain modifications of his contract, not material, however, to the decision of the present questions before the court. The defendant began work under the contract shortly after its date, and proceeded therewith until about January 14, 1884, when he was stopped by a preliminary injunction issued by the said court of common pleas. The cause having been subsequently removed by the defendant into this court, the injunction was here so modified, by an order made March 12, 1884, "as to leave the defendant, Thomas P. Simpson, at full liberty to proceed with the work of construction under said contract." The defendant, however, never resumed operations, and the work of construction has been at a stand-still. The defendant testifies that his cash expenditures have been \$42,229.69, but this includes ties ordered, but, it would seem, not delivered.

The evidence shows, and, indeed, it is one of the admitted facts in the case, that the railroad can be built under the contract of October 5, 1883, and its specifications, for \$180,000 cash.

Upon the proofs two questions arise for solution, viz.: *First*, whether the construction contract on the part of the railway company is *ultra vires*, as claimed; and, if so, then, *second*, whether the case is one for the interposition of a court of equity to rescind it, at the instance of the company.

1. It is certainly true, as the defendant's counsel urge, that railroad corporations have frequently contracted to pay for the construction of their roads in stock and bonds in amount, at the par value thereof, much in excess of the actual amount it would cost or was worth; and, undeniably, such contracts have received judicial sanction. *Van Cott v. Van Brunt*, 82 N. Y. 535, 539; *Ang. & A. Corp.* § 590a. But the contract now before the court must be tested by a provision of the constitution of the state of Pennsylvania, in the words following:

"No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at a meeting to be held after sixty days' notice given in pursuance of law." Article 16, § 7.

In view of this constitutional inhibition, can the construction contract of October 5, 1883, stand? The scope of this section has not

been judicially determined, nor even considered hitherto, so far as I am advised. Therefore, of its purview it becomes me to speak with caution. The intention would seem to be to interdict every issue by a corporation of stocks or bonds which do not in good faith represent a consideration in labor done, or property or money received, substantially corresponding in value with the face amount of such issue. But, upon a much less stringent construction, is it possible to sustain the issue of stock and bonds contemplated by the agreement under consideration? By its express terms, as we have seen, the defendant is not to expend more than \$200,000, and it is conceded that his entire expenditures for materials and in work would not, in fact, exceed \$180,000; yet, therefor, the corporation is to issue to him its full paid-up capital stock to the amount of \$300,000, and its first mortgage bonds to the like amount of \$300,000. For every dollar's worth of labor done for the corporation, or property received by it, or of money expended in its behalf, the defendant is to receive more than threefold in the stock and bonds of the company. A door is thus to be opened for throwing upon the market, to the beguilement of confiding people, corporation securities apparently representing \$600,000 of real value, but having actually behind them \$180,000 of value only. The above-quoted section of the new constitution of the state has strangely miscarried, if such an issue of "watered stock" and unsubstantial bonds can be emitted. If the transaction in hand is not within its prohibition, it would be difficult to conceive anything that would be. If the proposed issue of stock and bonds beyond the sum of \$180,000 would not be "fictitious," it is hard to divine the meaning which the framers of the constitution attached to that word.

Again, the authority to issue the proposed mortgage bonds is to be deduced from section 8 of the general railroad law of April 4, 1868. 2 Purd. 1213, pl. 8. But that section limits the indebtedness so to be created to the amount of capital stock subscribed, and authorizes "the issue of the bonds of the company therefor, in such amounts as shall not exceed double the amount actually paid up of the capital stock subscribed." And by the proviso to section 1 of the act of April 18, 1874, (P. L. 61,) regulating the manner of increasing the capital stock and indebtedness of corporations, it is enacted "that no corporation shall increase the amount of its indebtedness beyond the amount of its capital stock subscribed, until the amount of its capital stock subscribed shall be fully paid in." Now this construction contract entirely disregards these wholesome statutory restrictions. The original capital stock of the plaintiff company (all subscribed for in the articles of association) was \$250,000,—a sum far more than is necessary to accomplish all that the defendant has bound himself to do; yet not one dollar thereof has been called or paid in. Upon the uncontradicted proofs it is perfectly plain that the intention of all parties here was that this enterprise should be conducted without any

cash capital, and altogether upon the basis of an issue of corporation stock and bonds amounting to \$1,080,000,—a sum enormously in excess of the requirements of the railway company were its affairs honestly managed in obedience to the constitution and laws of the state. To make or perform such a contract as the one in question was beyond the lawful powers of this corporation, and the defendant was bound to know its legal incapacity.

2. There can be no doubt that a court of equity may entertain a bill to avoid a contract of a corporation which it had no power to make. *Auburn Academy v. Strong*, Hopk. (N. Y. Ch.) 278. And constructive fraud involving a breach of trust, or an abandonment of duty, or a violation of public policy, is a recognized ground for equitable interposition for the cancellation of agreements. 1 Story, Eq. Jur. § 694. Where there is fraud against public policy, a court of equity will rescind, notwithstanding the party plaintiff has participated therein, if public policy would be defeated by allowing the instrument to stand. Id. §§ 695, 695a. And so long as the contract continues executory, the maxim "*in pari delicto*" does not apply at all. Ad. Eq. *175; *Spring Co. v. Knowlton*, 103 U. S. 49. These principles open the way for equitable intervention here, and nothing appears to induce a denial of the relief sought. It is, indeed, inferable from the evidence that all the stockholders of the plaintiff company either expressly assented to the contract of October 5, 1883, or acquiesced for a season therein. But it is shown in *Thomas v. Railroad Co.* 101 U. S. 71, 33, that a contract not within the scope of the powers conferred on a corporation, and against public policy, cannot be made valid by the assent of every one of the shareholders. Nor is it a sufficient reason for refusing to interfere, that some of the directors, who were parties to the indefensible scheme for private speculation heretofore referred to, were active in promoting this suit, and in its prosecution. Even for them there is a *locus penitentiae*. *Spring Co. v. Knowlton*, *supra*. They, however, are not the complainants. The suit is by the corporation, which owes a paramount duty to the public. Its former course was inexcusable, indeed; but, having retraced its false steps, it is now in the right pathway. Having entered into a contract forbidden by public policy, (as was said in *Thomas v. Railroad Co.*, *supra*,) "it was the duty of the company to rescind or abandon it at the earliest moment." This it has done; but to the end that it may the better discharge its obligation to the public, it needs the aid of a court of equity to set aside the improvident and illegal contract with which it is embarrassed. The railroad is unfinished. The work of construction has ceased. Although free to proceed, the defendant for many months has done nothing. His inaction is, doubtless, wise; for, were this bill dismissed, he could not expect a court of equity to decree the specific performance of his construction contract; and if at law he could recover at all for future work, it would be as upon a *quantum meruit* only. It is better for the defendant that

there should be a decree of rescission, for it may be coupled with equitable terms securing him a just allowance. And this would be right; for, notwithstanding the charge of positive bad faith made by the plaintiff's counsel at the hearing against the defendant, nothing has been shown to deprive him of payment at a fair rate for all materials furnished and work done by him under the contract.

Such an allowance will be made, and to ascertain the amount thereof it will be necessary to send the case to a master.

Let a decree be drawn in accordance with the foregoing views.

LECLANCHA BATTERY CO. v. WESTERN ELECTRIC CO.

(Circuit Court, S. D. New York. August 25, 1884.)

TRADE-MARK—VALIDITY OF MARK IN DOUBT—PRELIMINARY INJUNCTION.

Where it is very doubtful whether the name claimed as a trade-mark does not describe the articles themselves, and the kind of them, and indicate that they are made according to the patent known by the name claimed, rather than that the patentee made them, a preliminary injunction should not be granted.

In Equity.

Edward N. Dickerson, Jr., for orator.

George P. Barton, for defendant.

WHEELER, J. The orator seeks, by motion for a preliminary injunction, to have the defendant restrained from using the words, "Pile Leclancha" and "Disque," and the orator's style of label, upon batteries of the defendant's manufacture. Leclancha was a patentee of an electric battery. One form of his batteries was known as the "disque." The word "pile" has been used to signify a battery. The prominent feature of the label is a cut of medals awarded to Leclancha's batteries. The question, of course, is whether these words and this label improperly indicate that the batteries come from the orator, or are merely descriptive of their style and qualities. The patented batteries, of course, would become known to some extent as Leclancha batteries, and the word "disque" would naturally follow that form. These words would become apt to describe the batteries and that kind of them, and would indicate that they were made according to the patent, rather than that the patentee, or the orator bearing his name, made them. *Singer Manuf'g Co. v. Stanage*, 6 FED. REP. 279; *Burton v. Stratton*, 12 FED. REP. 696; *Hostetter v. Fries*, 17 FED. REP. 620; *Wilcox & Gibbs S. M. Co. v. The Gibbens Frame*, Id. 623. As the medals were awarded to the patented batteries, the representation of them upon the labels would be indicative of the reputation of these batteries rather than of their origin. Under these circumstances and authorities, the question whether these things all together amount to

an unlawful representation of the source of the batteries is so doubtful that the granting of a preliminary injunction does not appear to be warranted.

Motion denied.

CITY AND COUNTY OF SAN FRANCISCO v. MACKAY.

(Circuit Court, D. California. September 8, 1884.)

1. TAXATION—CONSTITUTION OF CALIFORNIA—DOUBLE TAXATION.

The constitution of California forbids double taxation of property.

2. SAME—PROPERTY OF CORPORATION—ASSESSMENT OF SHARES.

It would be double taxation to tax all the property of a corporation to the corporation, and then assess to each stockholder the shares of stock in it held by him, and such assessment to the stockholder will be void.

3. SAME—PRESUMPTION OF OWNERSHIP.

The constitution and laws of California require all property to be assessed and taxed to the owner; and as it is a legal presumption that all property of a corporation has been assessed to the corporation, in the absence of a showing to the contrary, an assessment of stock to a shareholder will be considered a double assessment, and void.

4. SAME—ASSESSMENT IN GROSS—VALIDITY.

Semble, that an assessment in gross upon the aggregate of a great many thousand shares of stock in numerous corporations organized for a great variety of purposes, having no relation whatever to each other, and no common element of value, such as banking, mining, milling, lumbering, commercial, gas, moneys, solvent credits, etc., is void.

Action under California statute of April 23, 1880, to recover taxes for 1880–81, with penalties and interest.

David McClure, for plaintiff.

B. C. Whitman, for defendant.

SAWYER, J. This is an action to recover city and county and state taxes for the fiscal year 1880–81, together with 5 per cent. penalties, and interest at 2 per cent. per month, amounting, in the aggregate, to nearly \$500,000, of which aggregate about \$236,000 is the amount of the taxes originally levied.

The action is brought under the statute of April 23, 1880, prescribing a form of complaint, which requires the complaint to "describe the property as assessed." The description of the property in the complaint, and consequently "as assessed," is as follows:

"Seven thousand one hundred and twenty-five shares stock Nevada Bank; 3,200 shares stock Pacific Mill and Mining Company mining stock; 250 shares stock Pacific Wood, Lumber, and Flume Company; 1,000 shares stock San Francisco Gas Company; 47½ shares stock Giant Powder Company; 3,000 shares stock Virginia and Gold Hill Water Company; 937 shares stock Golden City Chemical Works; solvent credits, money; 39,570 shares of California Mining Company stock; 61,410 shares Consolidated Virginia Mining Company; 16,386 shares Ophir Mining Company; 15,718 shares Yellow Jacket Mining Company; Union Consolidated and Sierra Nevada Mining Company stock,—assessed at the valuation of \$10,680,000."

Defendant demurs on the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action. The property taxed consists of stock owned by defendant in various corporations, organized for a great variety of purposes; and, under the first ground of demurrer, it is claimed that the stock, as such, is not taxable to the defendant under the constitution and laws of California, and that the tax is, therefore, unauthorized and void. The tax is also claimed to be void as a lumping assessment. The supreme court of the state, in *Burke v. Badlam*, 57 Cal. 594, held that the constitution of the state does not authorize or require, but, on the contrary, forbids, a double taxation of property; that it would be double taxation to tax all the property of a corporation to the corporation, and then assess to each stockholder the shares of stock in it held by him. This decision by the state supreme court, giving a construction to the state constitution, is controlling in this court. The corporation is the immediate, primary owner of all the property of the corporation, the right of the stockholders in it being only derivative and secondary. The constitution and the laws require all property to be assessed and taxed to the owner, and the legal presumption is, as held in the case cited, nothing to the contrary appearing, that all property of a corporation has been assessed to the corporation, the owner, and consequently that all the property of the various corporations whose stock has been assessed to defendant was duly assessed to the corporations issuing it for the year 1880-81. That being so, the assessment of the stock in question to defendant is, as to the amount assessed, a second or double assessment of the same property, and, as such, void.

This is the logical, legal result of the decision of the supreme court in *Burke v. Badlam*, if I correctly apprehend its import, and the complaint fails to show a cause of action on that ground. An absolutely void tax, certainly, can constitute no cause of action. I am also inclined to think the tax void as an assessment in gross—a lumping assessment—upon the aggregate of a great many thousand shares of stock in numerous corporations, organized for a great variety of purposes, having no relation whatever to each other, and no common element of value, such as banking, mining, milling, lumbering, commercial, gas manufacturing, powder making, chemical works, etc., moneys, solvent credits, etc. One would suppose that a party would be entitled to have each class of property, having different values, assessed by itself, so that he can determine whether it is properly assessed or not. An assessment in gross upon a great variety of classes of property, having no relation to each other, and no common element of value, like those described in this assessment, affords no means of knowing whether any particular part or class of it has been properly assessed or not. It gives him no means of correcting an improper assessment before the board of equalization, or otherwise protecting himself from extortion. The authorities on this point have

not been cited by counsel, and I have not looked them up myself, and consequently I shall not now decide it. While I do not find it necessary to definitely decide the point, in view of the conclusion reached on the other branch of the objection, I deem it a proper occasion to intimate a very decided impression against the validity of such an assessment. The demurrer is sustained. The plaintiff desiring leave to amend as to a portion of the tax, leave is granted.

HAMBLY v. DELAWARE, M. & V. R. Co., Substituted, etc.

(Circuit Court, D. Delaware. July 21, 1884.)

1. COVENANT—IMPLIED CONTRACT—CONDITION PRECEDENT—DAMAGES—PLEADING.

By articles of agreement under seal, dated May 8th, executed by H. and a railroad company, H. agreed to furnish labor and materials for laying ties and rails on the third division of the company's road, from their depot grounds at G. to the shore of the Delaware bay, near L., and on the projecting wharf or pier to be constructed in connection therewith,—about 17 miles in all; and the said third division was to be ballasted and finished by the first of August next, if the rails and ties could be had by that time. H. was also to build and construct the wharf in conformity with the specifications set out in the agreement. The work was to be begun within 30 days after signing the articles; all the piles of the wharf to be driven by the last day of July; and the said wharf and the whole of the said division were to be finished and completed by the thirty-first of October ensuing. It was further agreed that immediately upon signing the said articles the plaintiff should subscribe for \$150,000 of the capital stock of the company, certificates for which were to be issued to him in part compensation for his services, etc. On the twentieth of August, while H. was engaged in the performance of his contract, and was ready, willing, and able to carry on, prosecute, and finish the same in manner and form, etc., he was prevented by the company from so doing, and was wholly discharged; and thereupon he brought his action for a breach of the covenant. The declaration contains seven counts, to five of which the defendant demurred, alleging that the covenants declared on were not the covenants of the defendant, but were repugnant to the express covenants in the articles of agreement; also, that the plaintiff, having neglected or failed to subscribe for the stock, begin the work, or finish the third division at the times agreed on, could not maintain this action. *Held*, that the agreement on the part of the plaintiff to do the work, and on the part of the defendant to pay for it, raised an implied covenant on the part of the latter to permit the plaintiff to do the work; that the time stipulations were not conditions precedent, not being made so in terms, nor can they be implied, being only agreements of the plaintiff, for the breach of which he might be liable to damages, if the defendant could show any damages resulting therefrom. If plaintiff's delinquency in these particulars evinced an intention on his part to abandon the contract, and not perform it at all, it would be evidence on that issue; and abandonment would have authorized the defendant to consider the contract at an end, and to stop the plaintiff from further meddling with the road and pier. The defendant could have pleaded justification of the prevention and discharge of the plaintiff, and put in evidence his failure on the time stipulations, his want of reasonable diligence, etc., in support of such a plea.

2. SAME—DAMAGES.

Where one party agrees to perform a service or work which necessarily requires time and progress in the performance, and is to receive a compensation from the other party therefor, if the party for whom the service or work is to be done puts an end to the performance, either before its commencement or

during its progress, the other party, though able and willing to proceed, cannot recover compensation for work not done, but can only recover damages for the breach of the contract; and those damages will consist of his outlay already incurred, and of the profits which he would have realized had he been permitted to complete the work; or in place of outlay, when the compensation for the service is divisible, he may recover compensation for the service already performed, and damages for being prevented from completing his contract.

3. PLEADING—ISSUES RAISED BY PLEA.

Pleas which attempt to raise an immaterial issue, or take issue upon a matter of law, held bad on demurrer.

In Covenant on Demurrers.

Anthony Higgins and Edward G. Bradford, Jr., for plaintiff.

Jacob Moore and William C. Spruance, for defendant.

Before BRADLEY, Justice, and WALES, J.

BRADLEY, Justice. This is an action of covenant, brought on an agreement under seal, made the eighth of May, 1869, between the plaintiff and the original defendant, whereby the plaintiff agreed to lay the superstructure of the defendant's railroad from Georgetown to Delaware bay, near Lewes, about 17 miles, under the direction of the company's engineer; and to build a pier out into the bay, according to certain specifications, and to furnish the cross-ties, iron rails, timber, and other materials therefor. The plaintiff further agreed to begin the work within 30 days from the execution of the agreement; to complete the road to the depot grounds at Lewes by the first day of August then next, if the rails and ties could be had by that time; to have the piles of the pier driven by the last day of July; and to complete the whole work by the thirty-first day of October. In compensation for the work thus contracted for, the defendant agreed to pay the plaintiff \$176,000 in the internal improvement bonds of the state of Delaware, (to be furnished to the defendant as provided for by an act of the legislature passed in 1865, and the amendments thereof,) and \$150,000 in certificates of full-paid stock of the company, for which the plaintiff was to subscribe on the execution of the contract. This consideration was to be paid as follows: Sixty thousand dollars as soon as that amount of materials should be furnished and labor performed, according to the estimate of the engineer, and monthly thereafter, upon like estimates, in amounts equal to the materials furnished and labor done during each month, respectively, with any balance before unsettled for; the part payments to be in bonds and stock, proportional to the respective amounts of bonds and stock to be paid for the whole work.

The declaration has seven counts, in each of which the agreement is set forth in full. The first and second counts rely upon the implied agreement of the defendant to permit the plaintiff to carry on the work to its completion, and allege, by way of breach, that the defendant prevented the plaintiff from doing so, and thereby deprived him of the profits of the undertaking. The statement of this implied covenant in the first count, as finally amended and settled by consent of the parties, is to the following effect, namely: That in

and by the said articles of agreement the defendant covenanted and agreed with the plaintiff to permit him to carry on, prosecute, and perform the work agreed to be done, until the same should be fully done and completed, in manner as provided in, and according to the provisions and requirements of, said articles of agreement, and the plan, design, and specifications therein referred to, or until the thirty-first day of October, 1869, whichever should first happen. In the second count it is slightly varied, stating the implied covenant to be to permit the plaintiff to perform and complete the work by the thirty-first day of October, 1869, in manner as provided in, and according to the provisions and requirements of, said articles of agreement, and the plan, design, and specifications therein referred to. The assignment of a breach in each case, after categorically alleging, in the terms of the covenant, that the defendant did not permit the plaintiff to perform and complete the work, proceeded to aver that, on the contrary, the defendant, before the work was fully done, to-wit, on the twentieth of August, 1869, did wrongfully prevent the plaintiff from carrying on and performing the said work, and from subscribing for the \$150,000 stock of the company, although the plaintiff was in good faith engaged in carrying on and performing said work, and ready, willing, and able to carry it on to completion, as provided in the agreement, and to subscribe for said stock.

These counts were demurred to, on the grounds—*First*, that the implied covenant to permit the plaintiff to do the work is not correctly set out; *secondly*, that the breaches, as set forth, do not correspond with the covenant; and, *thirdly*, that the counts are generally bad.

I do not think that either of these grounds is well taken. I do not well see how the implied covenant could have been better stated. The agreement on the part of the plaintiff to do the work, and on the part of the defendant to pay for it, certainly raised an implied covenant on the part of the latter to permit the plaintiff to do the work in the manner, and according to the provisions and requirements, of the agreement. This is exactly what the plaintiff, in the first and second counts, states the implied covenant to have been. It was certainly not necessary to repeat all those terms and requirements over again. These stood as they were written, unaffected by the covenant as expressed or unexpressed, and qualifying its effect in either case alike. In the two counts the implied covenant is set forth in different terms, but amounting to substantially the same thing. The agreement was that the work should be completed *by* the thirty-first day of October. This means that it should be completed on that day, or before. The first count expresses it in both ways; the second simply uses the terms of the agreement—*by the thirty-first of October*. Both are right.

It is objected that the implied covenant, as defined in the declaration, obliged the defendant to permit the plaintiff to go on with the

work without complying with certain conditions, such as subscribing for stock immediately upon the execution of the agreement, commencing within 30 days, etc. If these were conditions, either precedent or subsequent, they are fitly provided for in the qualification annexed to the plaintiff's definition of the covenant, namely, to permit the plaintiff to prosecute and perform the work until performed and finished *in manner as provided in, and according to the provisions and requirements of, the articles of agreement, and the plan, design, and specifications therein referred to.*

The counsel of the defendant, however, contend that several of the "provisions and requirements" of the agreement were conditions precedent, the performance of which was necessary to entitle the plaintiff to proceed further with the work, and to claim the compensation provided for; and that he ought to have alleged performance of these conditions, or that the company prevented him from performing them; and they enumerate the following as such conditions precedent: (1) Subscribing for \$150,000 capital stock upon the execution of the agreement; (2) beginning the work within 30 days therefrom; (3) having the piles of the pier driven by July 31st; (4) having the road ballasted and finished to the depot grounds at Lewes by the first of August. But I do not regard these engagements as conditions precedent, if they are conditions at all. They are not, in terms, made so by the parties themselves, and I cannot perceive any implied intent that they should be so. They stand simply on the agreement of the plaintiff, for the breach of which he might be liable to damages if the defendant could show any damages resulting therefrom. If the plaintiff's delinquency in these particulars evinced an intention on his part to abandon the contract, and not perform it at all, it would be evidence on that issue, and such abandonment would have authorized the defendant to consider the contract as at an end, and to stop the plaintiff from further intermeddling with the road and pier. This is the result of the most recent authority. *Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. Div. 648. It may be added that, as to the subscription of stock, the plaintiff does allege that the company prevented him from subscribing; and the completion of parts of the work at particular times was necessarily a thing subsequent to the performance of a large part of it; but still only extended to a part, and not to the whole consideration of the contract, both being circumstances on which courts often rely in construing a covenant not to be a condition precedent.

The next alleged ground of demurrer, namely, that the breaches of covenant assigned in the first and second counts do not correspond with the covenants set forth therein, is equally insufficient. The breaches assigned seem to me directly to traverse and deny the keeping of the covenants. The plaintiff not only categorically alleges that the company did not permit him to prosecute and perform the work until completed in the manner provided, but proceeds to allege

specifically, that after the making of the agreement and before the thirty-first of October, 1869, to-wit, on the twentieth of August, 1869, the defendant wrongfully prevented him from prosecuting and performing the work, and wrongfully prevented him from further prosecuting it and from subscribing the stock, although the plaintiff was engaged in good faith in carrying it on, and was ready, willing, and able to complete the same and to subscribe for the stock, according to agreement. In what terms more direct the plaintiff could have alleged that the company prevented him from performing the contract on his part, it is somewhat difficult to see.

The third count sets forth an implied covenant on the part of the defendant, at or within a reasonable time after the completion of the entire work, to pay the plaintiff, in bonds and stock as aforesaid, any balance then unpaid; and then avers that the plaintiff, before the thirty-first of October, 1869, and before the work was completed, and before the defendant's engineer had made any estimate, to-wit, on the twentieth of August, 1869, was, in good faith, engaged in prosecuting the work, and was ready, willing, and able to continue it to completion, and ready and willing to subscribe for the \$150,000 of stock; but that the defendant wrongfully prevented the plaintiff from prosecuting and performing the work, and from subscribing said stock, and thereby discharged him from further performance, and prevented the making of any estimate by the engineer; and the count then alleges as a breach of the covenant that the defendant has not paid the said plaintiff the said bonds or stock, or any part thereof. This count is demurred to on precisely the same grounds as the first and second counts are. It seems to me that the implied covenant to pay any balance that might be due after the completion of the work is well enough stated. But I think that the count is bad for other reasons. It proceeds upon the idea that the plaintiff is entitled to recover pay for work not done, on the ground that the defendant prevented him from performing his contract, and discharged him from the performance of it. He therefore claims the benefit of that rule of law by which one party is bound to perform his part of a contract when the other party has tendered performance on his part; as in a contract for purchase of land or a chattel, if the vendor tender a deed for the land, or delivery of the chattels, which is refused, he may compel the other party to pay the price agreed on; or, where any other thing is agreed to be done by one party which can be done at once, and the doing of which makes it the duty of the other party to pay a sum of money, or do some other thing, a tender—that is, a readiness and offer to do the thing so agreed to be done, and a refusal of it by the other party—will oblige the latter to pay or perform his part of the agreement; but when he has thus paid or performed he will be entitled to have the thing tendered. There are many cases of this sort. See *Platt*, Cov. 104; *Jones v. Barkley*, 2 Doug. 684; *Add. Cont.* §§ 880, 881; *Benj. Sales*, (3d Ed.) 859, and note. But
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where one party agrees to perform a service or work which necessarily requires time and progress in the performance, and is to receive compensation from the other party therefor, if the party for whom the service or work is to be done puts an end to the performance, either before its commencement or during its progress, the other party, though able and willing to proceed, cannot recover compensation for work not done, but can only recover damages for the breach of the contract; and those damages will consist of his outlay already incurred, and of the profits which he would have realized had he been permitted to complete the work; or, in place of outlay, when the compensation for the service is divisible, he may recover compensation for the service already performed, and damages for being prevented from completing his contract. *U. S. v. Behan*, 110 U. S. 338; S. C. 4 Sup. Ct. Rep. 81. The third count, therefore, is based on an incorrect view of the law. It claims compensation for work not shown to be done, instead of claiming damages for expenditures incurred and profits lost, which is the only ground of claim that could properly be made, according to the facts disclosed. The defendant is therefore entitled to judgment on the demurrer.

The fifth count alleges full performance of the contract on the part of the plaintiff by completing the road and pier on or before the thirty-first of August, 1870, and that the same was accepted by the defendant, without alleging any estimate or certificate of the engineer; breach; non-payment of compensation agreed on. The defendant demurs to this count for several reasons: (1) That it does not show that the work was completed within the time or times required; (2) nor that the company waived this condition; (3) nor that any estimates were made by the engineer; (4) that it does not show any breach by the company of any covenant required to be performed by it. I have already stated my opinion that the covenants as to time were not conditions precedent. This disposes of the first and second grounds of demurrer. The third ground, that no estimates are shown to have been made by the engineer, is not material. These estimates were only required for the purpose of determining the amount of work done, from time to time, to entitle the plaintiff to partial installments of payment. When the work was completed the whole compensation stipulated for became due, or any balance thereof remaining unpaid. The objection that no breach is assigned upon any covenant binding on the defendant is untenable. The breach assigned is non-payment of the bonds and stock stipulated for. This is sufficient. The defendant covenanted to pay the bonds and stock as compensation for the work; and, no time being fixed for payment, (except when partial installments should be required,) the implication is that payment was to be made on the completion of the work. This is the effect of the general covenant to pay. The breach of this covenant is sufficiently well assigned; and judgment must be for the plaintiff on the demurrer to the fifth count.

The sixth count being similar to the fifth, except that it alleges that estimates were duly made by the engineer, the like judgment must be given on the demurrer to that also.

To the fourth and seventh counts, respectively, the defendant interposed 21 pleas. Those to the fourth only need be considered. This count is similar to the third, except that it omits to set out the implied covenant which is set out in that count. Demurrers were put in to the second, third, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth pleas. Issue was joined, or tendered and accepted, on the others.

The second plea traverses the allegation of the count that the plaintiff, at the time of the alleged prevention, "was in good faith engaged in carrying on, prosecuting, and performing said work." This plea puts in issue the plaintiff's "good faith." It may be taken as admitting that the plaintiff was, in fact, "engaged in carrying on, prosecuting, and performing said work," but as denying that he was doing so "in good faith." Now, if the work was being properly done, of what possible consequence was it to the defendant whether it was being done in good faith or in bad faith. No attempt is made to show in what respect the plaintiff was acting in bad faith, or whether it in any way affected the due performance of the contract. I am clearly of opinion that the plea raises, or attempts to raise, an immaterial issue, and that judgment must be for the plaintiff on the demurrer.

The third plea avers that, at the time of the alleged prevention, the plaintiff was not (as in the fourth count it is stated that he was) ready, willing, and able to further carry on, prosecute, and perform the work until it should be completed. The averment of the fourth count thus traversed is a material one. If the plaintiff was not ready, willing, and able to further carry on the work, the defendant had a right to rescind the contract and stop the plaintiff from going on. Failure on his part to keep some of his engagements would not give the defendant such right; but inability or unwillingness to prosecute the work to completion would;—understanding by the term "unwillingness" an intent not to perform, but to abandon the contract, which is its legal effect in this connection. If, under this plea, the defendant should prove that the plaintiff, at the time he was prevented from going forward, did not intend to perform the contract, but meant to abandon its performance, or that he was absolutely unable to perform it from some inability which could not be overcome, (and nothing short of such proof would be sufficient,) it would be a good justification of the prevention charged; for it would be a good ground for rescinding the contract, which the prevention of the plaintiff from going on virtually amounts to.

Giving this effect to the plea, (which is its legitimate effect,) it is a good plea to the fourth count, and judgment should be given for the defendant on the demurrer thereto.

The sixth plea alleges that the defendant did not *wrongfully* dis-

charge the plaintiff from further carrying on the work. This is demurred to. It does not, in terms, traverse any averment of the count. The latter alleged that the defendant *wrongfully prevented* the plaintiff from further carrying on the work, and did *thereby* wholly discharge him from further carrying it on, and thereby prevent the making of any estimate by the engineer. The plea takes issue, not on the prevention of the work, (which is the thing charged,) but only on the alleged consequence of that prevention, namely, the discharge from further performance; and not even on that, but it denies that the defendant *wrongfully* discharged the plaintiff. The plea has two faults: *First*, in taking issue on an alleged result or consequence; and, *secondly*, in making the rightfulness or wrongfulness of that result a part of the issue. It is manifestly open to the objection of taking an issue upon matter of law. Judgment must be for the plaintiff on this demurrer.

The seventh and eighth pleas are amenable to precisely the same objection as is the sixth plea, and judgment must be for the plaintiff on the demurrers to those pleas.

The tenth plea alleges that the plaintiff neglected, *upon the execution of the contract*, "to subscribe for \$150,000 of the capital stock of the company." The count alleges that the defendant wrongfully prevented the plaintiff from subscribing said stock. The plea, in answer to the charge of wrongfully preventing the plaintiff from further prosecuting the work after he had commenced to prosecute it, and from subscribing the stock, sets up the defense that he neglected to subscribe for the stock upon the execution of the contract, thus making the time of subscription a material part of the issue. I have already stated my opinion that the time was not a condition precedent; consequently, it was not material. To show that it was material, however, counsel for the defendant refers to the statute, by which the defendant was to have use of the state bonds, with which it had agreed to pay the plaintiff in part for his work. That statute required the stock of the defendant to be subscribed and paid in before the bonds would be issued. A supplement, passed a day or two prior to the execution of the agreement in this case, authorized the payment of the stock to be in material, work, and labor. It is evident, therefore, that the condition of obtaining the bonds (if the stock was not paid for in money) could not be performed until the material, work, and labor were supplied and furnished. Therefore the failure to make the subscription before the material, work, and labor were supplied (if made then) could make no difference to the defendant. There appears to be nothing in the statute, therefore, to make the exact time of subscription material. Judgment must be for the plaintiff on the tenth plea.

The eleventh plea is that the plaintiff did not begin the work in 30 days from the time of the execution of the agreement. From what has already been said, this is an immaterial matter. The time

of commencement was not a condition precedent. Judgment must be for the plaintiff on the demurrer to the eleventh plea.

The fourteenth and fifteenth pleas are bad for the same reason, alleging only that the piles of the pier were not driven, and that the road was not completed to the station ground at Lewes in the respective times agreed on.

The twelfth plea alleges that the plaintiff did not, with reasonable diligence and within a reasonable time after the making of the agreement, *in good faith*, begin the work. Here, again, the "good faith" of the plaintiff is put in issue; and, for the reasons stated in considering the demurrer to the second plea, the demurrer to the twelfth plea must be sustained, and judgment given thereon for the plaintiff.

The thirteenth plea alleges that the plaintiff did not, after he began the work, thenceforth exercise reasonable diligence in carrying on, prosecuting, and performing it. Did the fact set up in this plea justify the defendant in putting an end to the contract by preventing the plaintiff from going on under it? That is the question. It may be that the plaintiff was under an implied contract to exercise reasonable diligence, and, not doing so, was liable in damages. It may even be that his failure to exercise reasonable diligence was evidence from which a jury might infer an intention on his part to abandon and be no longer bound by the contract, which intention would justify the defendant in rescinding it. But was it of itself a fact sufficient to justify such a course? According to the law as laid down in the latest English authorities it was not. Lord COLERIDGE, in delivering the judgment in *Freeth v. Burr*, L. R. 9 C. P. 208, Benj. Sales, (3d. Ed.) § 904, says:

"In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. * * * I think it may be taken that the fair result of the decisions is that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

This rule was approved in the recent case of *Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. Div. 648, in the court of appeal, where Sir GEORGE JESSEL, and Lords Justices LINDLEY and BOWEN, stated the true test to be that suggested by Lord COLERIDGE, viz., whether the acts and conduct of the one party evince an intention to abandon and be no longer bound by the contract, and that this is a question of evidence. See Benj. Sales, (3d Ed.) § 903.

Now, it cannot be said that failure to exercise reasonable diligence in prosecuting the work is, in law, proof of abandonment of the contract, though it may be evidence for a jury. The defendant pleads it as sufficient proof, in law. The proper plea would have

been that the plaintiff had abandoned the contract, and the want of reasonable diligence would have been evidence for the jury under that plea.

In my judgment the plea is bad, and the demurrer must be sustained.

This disposes of all the issues of law, and judgment will be entered accordingly.

WALES, J., *concurring*. On the eighth of May, 1869, a contract under seal was made by and between Thomas C. Hambly and the Junction & Breakwater Railroad Company, and this action was brought by the plaintiff against that company for the breach of its covenants. After the issuing of the writ, the company, by acts of the legislatures of Delaware and Maryland, became consolidated with two other railroad companies, the three becoming one corporation under the name of the Delaware, Maryland & Virginia Railroad Company, and all debts and liabilities of either of said original companies, upon their consolidation, attached to the new corporation, and became enforceable against it to the same extent as if said debts and liabilities had been contracted or incurred by it; and by proceedings had in this court the new company was made party defendant in lieu of the Junction & Breakwater Company, and has appeared by its attorneys and pleaded to the declaration.

By this contract the plaintiff agreed to furnish the requisite materials and perform the necessary work in laying down the cross-ties and iron rails on the third division of the company's road, extending from Georgetown to the shore of the Delaware bay, near Lewes, in the state of Delaware, a distance of 17 miles, and on the projecting wharf or pier to be constructed by him in connection therewith. The said division had already been graded and bridged. The materials and work were to be furnished and done under the direction of the company's engineer, "the said third division of the road of the said company to be ballasted, finished, and completed in a good and workmanlike manner, to the depot grounds at Lewes, by the first day of August next, if the ties and rails can be had by that time." The said plaintiff also agreed to build the said wharf in conformity with the plan and design as set out in the contract; "the said wharf or pier and the whole of the said division of the said road to be finished and ballasted, and the work thus contracted to be done and performed by the said party of the first part, is to be finished and completed by the thirty-first day of October next." "The whole compensation" to be paid to the plaintiff by the company was the sum of \$326,000, payable in stocks and bonds as follows: The sum of \$176,000 in bonds authorized by the state of Delaware to be issued to the company, and the sum of \$150,000 in certificates of full-paid stock of the company. The first payment or installment was to be made as soon as materials had been supplied and work performed on the said railroad or pier,

"or on either," to the amount of \$60,000, according to the estimate of the company's engineer; and at the end of each month thereafter, as the work progressed; further payments were to be made by the delivery of bonds and stocks, in amounts estimated to be due by the engineer, and in the same proportions of bonds to stocks as provided for the payment of the whole compensation.

The plaintiff further agreed to begin the work in 30 days from the date of the contract, and to have all the piles of the wharf driven by the last day of July following, and, immediately upon signing the contract, to subscribe for \$150,000 in shares of the stock of the company, the same to be paid for in work and materials. This is a brief summary of the terms and provisions of the contract.

The declaration contains seven counts, each one setting forth the articles of agreement in full, and assigning breaches. The defendant has demurred generally and specially to all of the counts, excepting the fourth and seventh, to which he has pleaded. The cause of the demurrers to the first two counts are alike in substance, and may be considered together. These counts assign breaches of the defendant's covenants (*first count*) "to permit the said plaintiff to carry on, prosecute, and perform the work by him in said articles of agreement covenanted and agreed to be done until the work so covenanted and agreed to be done should be fully done, performed, finished, and completed by the said plaintiff in manner as provided by said articles of agreement, and in the plan, design, and specifications therein referred to, or until the thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-nine, whichever should first happen;" and (*second count*) "to permit the said plaintiff to fully do, perform, finish, and complete, by the thirty-first day of October," etc., "the work by him in said articles of agreement covenanted and agreed to be done and performed."

The causes of demurrer are (1) that the company did not make the covenants declared on; (2) that the said covenants are inconsistent with and repugnant to the express provisions of the articles of agreement; (3) that the breaches do not correspond with the covenants as set forth in the said counts. By these demurrers the defendant denies the existence of the implied covenants declared on, and also contends that if such covenants can be implied they are not absolute, but subject to certain conditions precedent, to-wit: (1) That the plaintiff should subscribe for the stock upon the execution of the contract, May 8, 1869; (2) that he should begin work in 30 days from that date; (3) have all the piles of the wharf driven by the last day of July; and (4) ballast, finish, and complete the third division by the first of August, if the rails and ties could be had by that time.

The first question, then, is, do those articles contain the implied covenants declared on? No particular words are necessary to create a covenant. Any words in a sealed instrument by which a party

manifests an intention to do or not to do an act, either by himself or a third person, if the act be lawful, will make a covenant, and the law will hold him to his undertaking. Implied covenants depend for their existence on the intendment and construction of law. There are some words which do not of themselves import an express covenant; yet, being made use of in certain contracts, have a similar operation and are called covenants in law, and are as effectually binding on the parties as if expressed in the most unequivocal terms. There may be implied covenants in a deed in which there are express covenants, but there can be none contradictory to or inconsistent with or repugnant to express covenants. *Platt, Cov. 40; Randel v. C. & D. Canal Co. 1 Har. 270.* It follows, from an application of these elementary principles, that where one party employs another to perform certain work, and they enter into a contract by which one covenants to do the work and the other promises to pay for it, there arises an implied covenant that the promisor will permit the work to be begun and carried on according to the terms of the contract. There is no necessity, therefore, for making any express covenant for doing what was clearly understood by the contracting parties should be done, and without which the covenants on either side could not be performed. If, on the faith of these articles of agreement, the plaintiff had expended time and money in collecting materials and engaging laborers, and was actually employed in carrying on and prosecuting the work he had agreed to perform, and was ready, willing, and able to complete the same when he was stopped by the company, it is no answer to plaintiff's claim for damages by reason of such stoppage, to say that there was no express covenant on the part of the company to permit him to go on. The law will imply such a covenant; and this principle is nowhere more clearly stated than by Justice CLIFFORD in *Hudson Canal Co. v. Penn. Coal Co. 8 Wall. 276*:

"Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed; but omissions or defects in written instruments cannot be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as, where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law, in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract." "So, if one person engages to work and render services which require great outlay of money, time, and trouble, and he is only to be paid according to the work he performs, the contract necessarily implies an obligation on the part of the employer to supply the work."

And the same court, in *U. S. v. Behan, 110 U. S. 346*, speaking through Justice BRADLEY, says:

"It is to be observed that when it is said in some of the books that where one party puts an end to the contract, the other party cannot sue on the con-

tract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract, for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to."

The plaintiff in the present case claims not compensation for performance, but damages for prevention. Each count is a declaration of itself, and the two which we have been considering are on covenants by the company which are plainly implied by intendment of law from the words of the contract and the intention of the parties as therein expressed. But conceding the existence of the implied covenants on the part of the company to permit the plaintiff to carry on, prosecute, and complete the work in manner and form as provided by the contract, or by the thirty-first of October, the defendant objects to the plaintiff's right of action because these counts do not set out or allege certain dependent covenants, or conditions precedent, and their performance by him or a waiver of performance by the company. The prevention complained of was on the twentieth of August, 1869, and the question arises, what, if any, were the covenants to be performed by the plaintiff before that time in order to entitle him to maintain this action? The defendant relies on the stock subscription, the beginning of the work in 30 days, the driving of the piles by the last day of July, and the completion of the third division by the first of August, as conditions precedent to the plaintiff's right to go on and finish the work.

As in the case of implied covenants, no precise technical words are required to constitute a condition precedent. Whether a condition be precedent or subsequent, or a covenant be dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties as far as that can be collected from the instrument, to which intention, when once discovered, all the technical forms of expression must give way; and, however transposed the covenants may be, their precedence must depend on the order of time in which the intent of the transaction requires the performance. 1 Selw. N. P. 533, tit. "Covenant." Covenants have been divided into three general classes: *First*, covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, until the prior condition be performed, the other party is not liable to an action on his covenant. *Second*, covenants which are mutual conditions to be performed at the same time; and in these, if one party is ready and offers to perform his part, and the other neglects

or refuses to perform his, he who is ready and offers, has fulfilled his engagement and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The *third* class are called mutual or independent covenants, where either party may recover damages from the other for the injury he may have sustained by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. There is no unvarying rule by which the distinction between covenants and conditions can be accurately ascertained, since no particular words are required to create either, and it is immaterial, in point of construction, whether the clause in the instrument be placed before or after others. Platt, Cov. 71, 72.

The plaintiff was to complete the whole work by the thirty-first day of October, supposing that to be the ultimate period of time allowed him under the contract; and we are to discover, if we can, from its language, the circumstances attending the transaction and the objects for which the contract was entered into,—whether the parties intended and understood that every time stipulation mentioned in the contract was to be considered as a condition precedent, the non-performance of which would deprive the plaintiff of his right of action for the defendant's prevention of the performance of work to be done thereafter. For instance, in order of time, the first thing to be done was the subscription for the stock. Was it the intention of the parties that if, without immediately subscribing, the plaintiff should begin the work in 30 days after the date of the contract, and be actually employed in the performance of all the other covenants contained in it, though he was ready and willing to subscribe, and would have subscribed except for the prevention by the company, he should not have the right to maintain this action for his prevention by the company of the performance of the other covenants? The subscription was for the plaintiff's benefit, and was in no manner essential to his beginning or carrying on the work. The stock was to be paid for by work and materials, and the certificates for the same could not be delivered to him until he had subscribed for it on the books of the company. The company could in nowise be injured by his delay or neglect to perform the subscription covenant, and it had no necessary connection with covenants to be performed subsequently in point of time; whether he subscribed before or after beginning the work could make no difference. It cannot, therefore, be implied that this was a condition precedent. So, also, in relation to the driving of the piles for the wharf and completing the third division by the last of July and first of August, respectively, the plaintiff might fail in point of time to perform these covenants, and yet be able and have the right to perform the whole work on or before the thirty-first day of October. These time stipulations were not so necessarily and indissolubly connected that one should be made dependent on the other. The company was well secured against the default or the neglect of the plain-

tiff, who was to receive no compensation until he had furnished work and materials to the amount of \$60,000 under the estimate of their own engineer, and until the materials and product of the plaintiff's work had become their property permanently invested for their use. Had the parties intended that these time stipulations should be considered as conditions precedent, in the manner now claimed by the defendant, it would have been easy for them to have expressed that design. But, not only was the company secure in retaining the compensation agreed to be paid at the end of each month; it also had the power of annulling the contract, on reasonable notice to the plaintiff, by reason of his misconduct, delay, or neglect, and holding him liable for the breach of any of his covenants in an action for damages. Supposing the main purpose of the contract was the completion of the whole work by the thirty-first of October, and that the plaintiff was in fact ready and willing and able to perform that covenant, and that the interpretation we have given to this contract in reference to what have been called the time stipulations be correct, it follows that the prevention by the company was wrongful, and the plaintiff is entitled to his action. *P., W. & B. R. Co. v. Howard*, 13 How. 339.

There is no doubt of the truth of the legal propositions stated in the defendant's argument, that, where there are dependent covenants, a party cannot recover without averring that he has performed, or was ready and willing to perform, or was prevented from performing by the other party; and that, where several things are to be done by the plaintiff precedent to the performance of the defendant's part of the agreement, it is necessary for the plaintiff to aver performance of all the things to be done by him, unless the same has been excused or waived. But conceiving, as we do, that the covenants we have been considering are mutually independent ones, we are of the opinion that the demurrers to the first two counts cannot be sustained.

The third count is on the company's covenant to pay the full sum of \$326,000 in bonds and stock for the work and materials contracted for, and the breach assigned is for the non-delivery of the said bonds and stock, or any part thereof. This count also alleges that, while the plaintiff was engaged in good faith in carrying on the work, and was ready, able, and willing to finish it according to the terms of the contract, and was ready and willing to subscribe for the stock, and would have subscribed but for the wrongful prevention by the company, the company, on the twentieth of August, 1869, and before any estimate had been made by its engineer, wrongfully prevented the plaintiff from further carrying on the said work, and from subscribing for the stock, and thereby wholly discharged him from the performance of his covenant, and prevented the making of any estimate, etc. The plaintiff, by this count, seeks to recover the whole amount of the compensation agreed upon as the consideration for all the materials and work which were to be furnished and performed in the completion of the entire work. His assumption is that the

wrongful prevention by the company, under the circumstances, was equivalent to a full performance by him of what he had contracted to do, and therefore entitles him to the whole amount of compensation named in the contract. The claim is not for materials or work actually furnished and done, but is made on the basis of a theoretical and technical performance of the plaintiff's covenant to complete the laying of the ties and rails, and constructing the pier, on or before the thirty-first of October.

We think that this demand is too broad. It does not appear reasonable that the defendant should be compelled to pay for labor and materials which exist only in the imagination, nor do we find any principle or authority which supports the plaintiff's proposition to this extent. It is not like the case of the sale and delivery of a chattel, where the seller has delivered, or is ready to deliver, and the purchaser refuses to pay for or to take the article. Justice may require that the plaintiff should be put into as favorable a position as he would have been had he been permitted to go on and finish the work under the contract; that is, he should receive all the advantages and profits that he could have gained if the contract had been fully performed on both sides; but that would be a measure of damages for losses actually sustained, and of the deprivation of profits which might have accrued, and which would rarely or never equal in amount the whole consideration, especially in a contract of this nature, where the work and materials would necessarily involve a large outlay of time and money.

In *Laird v. Pim*, 7 Mees. & W. 473, the plaintiff sought to recover from the defendants the whole amount of the purchase money of a lot of land of which the defendants had gone into possession under an agreement to pay for it as soon as the conveyance should be completed. The plaintiff averred that he offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing. The plaintiff had a verdict for £680, and on a rule to show cause why the damages should not be increased by the sum of £4,125, the amount of the purchase money, it was held that "the measure of damages in an action of this nature is the injury sustained by the plaintiff by reason of the defendants' not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money, in consequence of the non-performance of the contract? It is clear that he cannot have the land and its value, too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant; as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again."

In *Cort v. Ambergate, etc., Ry. Co.* 79 E. C. L. 126, it was held that, on a contract for the manufacturing and supply of goods from

time to time, to be paid for after delivery, if the purchaser, having paid for and accepted a portion of the goods, gives notice to the vendor not to manufacture any more, proof of such notice will entitle the plaintiff to recover on a count alleging that he was ready and willing to perform the contract, and that the defendant refused to accept the residue of the goods, and prevented and discharged the plaintiff from supplying them, and from further executing the contract. Such notice is prevention and discharge, and the vendor, having been desirous and able to complete the supply, may, without manufacturing and tendering the rest of the goods, maintain an action for breach of the contract; and the jury were directed to give such damages as would leave the plaintiff in the same situation as if the defendants had fulfilled their contract. In that case it was not claimed that the plaintiff was entitled to receive the whole consideration, but that the prevention and discharge were equivalent to a performance on his part, in so far that it enabled him to maintain an action for breach of contract. But in the third count we understand the plaintiff to go further, and to claim the full compensation named in the contract, without reference to what he has actually done, or to what might be judged on the evidence to be a just and reasonable award for his damages. For these reasons we think this count bad.

The fifth count alleges the performance of the work, and that the same was done and all the materials furnished in manner required in the articles of agreement on or before the thirty-first day of August, 1870, and that the same were accepted by the defendant. Breach, that the company had not, within a reasonable time thereafter, paid or delivered the said bonds or stock, or any portion of them. The objections taken to the sufficiency of this count by the defendant are that the time stipulations were not observed by the plaintiff as required by the contract, the omission to state that these stipulations were waived by the company, and that it does not appear that any estimate or estimates were made by the engineer.

The time stipulations having been disposed of, we are brought to a consideration of the effect of the acceptance of the work and of the question of the time of completion. Whether time is or is not of the essence of a contract depends on the expressions and intentions of the parties. The rule is, where the work has been commenced, the completion of it by a day named will not, in general be a condition precedent to the workman's right to the stipulated hire. Thus, in the case of a contract to build a house, where the employer furnishes the land, which is the principal material for the work, if the house is not built by the time specified in the contract, but is afterwards completed, the employer, who has got the house, and has had the value of his land increased by its erection thereon, can never be permitted to free himself from his obligation to pay for it by alleging that the work was not done by the time appointed. The stipulation as to time is not,

in such a case, a condition going to the essence of the contract. The parties never could have contemplated that if the house were not completed by the day named the builder should have no remuneration. At all events, if an engagement so unreasonable was contemplated, the parties should have expressed themselves with a precision that could not be mistaken. Add. Cont. 447. Here the company does not object that the work was not done according to the plan and specifications, nor is there any denial of the alleged fact of acceptance by them on the thirty-first of August, 1870. Admitting these facts, on what principle should the company be exonerated from their covenant to pay the compensation agreed on, or the plaintiff be debarred from maintaining his action to recover the same? They have the materials furnished by the plaintiff and the product of his labor, and the main purpose of the articles of agreement has been accomplished, so far as they were concerned, in the laying of the ties and rails, and the construction of the pier by the plaintiff, whereby their property has been permanently increased in value; but because the work was not completed by the day named in the contract the defendant denies the right of the plaintiff to recover. In the absence of any expression of intention of the parties that a failure to complete the work by that day should be a forfeiture of the compensation, coupled with the uncontradicted fact of acceptance, and with the inference that the company must have permitted and consented to the plaintiff's carrying it on after that day, the fair conclusion is that the completion of the work on the thirty-first of October, 1869, was not intended to be a condition precedent to the delivery of the stock and bonds. The reasonable implication is that within a reasonable time after the completion, whether on the thirty-first day of October, 1869, or on a subsequent day, the company would pay.

The supreme court of the United States, in *Van Buren v. Digges*, 11 How. 461, and in *P., W. & B. R. Co. v. Howard*, 13 How. 339, has decided that a failure of performance by the time fixed in the contract does not necessarily deprive the party who does the work of the right to demand and receive the contract price for what has been done under the contract. In the last-named case the plaintiff had contracted to finish certain work by the first of November, 1836; but, failing in this, he continued the work until January 18, 1838, when the contract was determined by the company; and the question was whether the covenant to pay was dependent on the covenant to finish the work by the first day of November. The court, speaking through Justice CURTIS, says:

"We do not deem it needful to review the numerous authorities, because we hold the general principle to be clear, that covenants are intended to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument; and in this case we find no difficulty in arriving at the conclusion that the covenants were throughout independent. There are in this instrument no terms which import a condition, or expressly make one of these covenants in any particular

dependent on the other. There is no necessary dependency between them, as the pay for work done may be made though the work be done after the day. The failure to perform on the day does not go to the whole consideration of the contract, and there is no natural connection between the amount to be paid for work after the day and the injury or loss inflicted by a failure to perform on the day. Still, it would have been competent for the parties to agree that the contractor should not receive the monthly installment due in November, if the work should not then be finished, and that he should receive nothing for work done after that time."

Supposing, however, that the time for completion was essential, the plaintiff contends that it is not now competent for the company, after its acceptance of all the work performed after October 31, 1869, and treating the contract as continuing in force thereafter, to plead in bar the failure to perform by that day. The company might have annulled the contract; but, not having done so, and having elected to allow the plaintiff to go on with it, they cannot now be permitted to set up the plaintiff's failure to perform in time as a complete defense to this action. The time originally appointed for performance may be waived by the conduct and acts of the parties, and by the contract being treated and acted upon as a continuing contract after the appointed time. Add. Cont. 176. The acts of the parties thus render an express waiver on the part of the company unnecessary, and a statement or description of such acts as amount to a virtual waiver will be all that is requisite. This the plaintiff has done in the fifth count. The only remaining objection to this count is its omission to allege the making of the estimates by the engineer as the work progressed or on its final completion. This allegation was not necessary, because those estimates were to be made only for the purpose of ascertaining when the plaintiff should have earned \$60,000, and the amounts of the monthly payments thereafter, and do not apply to the compensation as a whole. The plaintiff had the option of receiving his pay monthly, after the first installment had been paid, on the engineer's estimate of the value of the materials supplied and work done for each month, or of waiting until the whole work had been done under the contract and receiving the total contract price. This was fixed at \$326,000, and the plaintiff could receive no portion of it as the work progressed, except on the engineer's estimates; but these estimates do not relate to or affect the final payment to be made of any balance that might have been due or the payment of the whole sum, if no portion of it had been previously paid, on the full performance of the contract. Payment was at no period to be made in advance of the work. The estimates were to fix the amounts of the monthly installments, but could not control, increase, or diminish the whole compensation agreed upon to be paid.

The demurrer to the sixth count rests on the same grounds as those taken to the fifth count, with the exception of the estimates, and must be overruled for the same reasons.

Demurrers to the pleas to the fourth count. The second plea tra-

verses the allegation that at the time of the alleged wrongful prevention the plaintiff was in "good faith" engaged in carrying on, prosecuting, and performing said work. The plaintiff objects to this plea that the "good faith" was not a condition precedent to his right to maintain this action; that the plea seeks to raise an immaterial issue; and that it is evasive and argumentative in that it only indirectly denies the wrongful prevention. The plea is bad for the reason that it attempts to set up as a fact that which is properly only a matter of evidence, namely, whether or not the plaintiff was acting in good faith on the twentieth of August, 1869, when the defendant stopped him from going on with the work. It goes to the intention of the plaintiff, and not to his acts. It offers an immaterial issue, and does not directly deny the wrongful prevention complained of.

Third. The third plea denies that the plaintiff was ready, willing, and able to further carry on the work at the time when he was prevented, etc. This is a direct traverse of the plaintiff's statement, and is a good plea in bar; for, unless he was ready, willing, and able to go on and finish the work at the time when, etc., he is certainly not entitled to maintain this action. His right to the recovery of any damages for the alleged wrongful prevention depends wholly on his willingness and ability to perform what he had agreed to. *Cort v. Ambergate, etc., Ry. Co.* 79 E. C. L. 143. His want of ability to go on and finish the work was a good and sufficient cause for stopping him.

Sixth. The sixth plea, that the company did not wrongfully discharge the plaintiff, does not confess and avoid, or traverse and deny, the matter set forth in the count. The averment is that the plaintiff was wholly discharged by the company by reason of its wrongful prevention. The plea is therefore argumentative, because, while not directly traversing the wrongful prevention or the discharge, it offers a different issue, viz., whether the plaintiff was rightfully or wrongfully discharged.

Seventh. For the same reasons, the seventh plea, being of like character and nature as the sixth, is also demurrable.

Eighth. This plea traverses what is not contained in the count. There is no allegation of a wrongful prevention of the making of the estimates in this count. The averment is that the plaintiff was wrongfully prevented from going on with the work, whereby the making of any estimate was prevented. The plea presents a negative pregnant, by inferentially acknowledging that the making of the estimates was prevented by the company, though such prevention was not wrongful. The plea is therefore bad on this ground. *Gould*, Pl. c. 6, §§ 29-33.

Tenth and Eleventh. These pleas set up the failure of the plaintiff to subscribe for the stock on the signing of the articles, and that he did not begin work within 30 days after the date of the contract. These matters have been decided not to be conditions precedent to

the plaintiff's right of action, and the demurrers to these pleas are therefore sustained.

Twelfth. That the plaintiff did not, with reasonable diligence, and within a reasonable time after the date of the contract, in good faith begin the work, etc. It is objected that these were not conditions precedent, and that the plea, being in the nature of a plea in confession and avoidance, does not in terms confess or admit any of the allegations contained in the count. This plea, if intended to be in justification of the company's acts, should expressly or tacitly confess the act which it is intended to justify. Avoidance cannot be pleaded unless the act complained of be admitted. Gould, Pl. c. 6, § 111.

The defendant might have pleaded abandonment on the part of the plaintiff, or his intention of abandonment, and given the want of beginning in reasonable time and the want of reasonable diligence in evidence of such abandonment, or of the intention to abandon the work.

Fourteenth and Fifteenth. These pleas, depending on the non-performance by the plaintiff of the subordinate time stipulations as a bar to this action, cannot be sustained, since we have already decided that those stipulations are not conditions precedent.

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING Co. v. SLOAN and another.

'Circuit Court, S. D. New York. August 23, 1884.)

1. CONTRACT—MEETING OF MINDS—MISTAKE—INTENTION OF PARTY.

Where there is any miscarriage in expressing the mind of a party to a contract, it would seem to be just that he should be bound by what he fairly expressed, whether he intended it as he expressed it or not.

2. PRACTICE—VERDICT—WEIGHT OF EVIDENCE.

Where the jury do not come to their finding without competent evidence, and the verdict is not so against any great preponderance of evidence as to show that it was reached through passion, prejudice, or other improper motive, or want of consideration, and no error of law intervenes, the verdict should be sustained.

Motion for New Trial.

William G. Choate, for plaintiff.

Hamilton O'Dell, for defendant.

WHEELER, J. There was no question at the trial but that the plaintiff commenced and proceeded with the construction of two steam-ships, until stopped by the defendants, upon some understanding with them that the ships would be wanted, at the price of \$570,000, when completed, for an enterprise in which they were interested, and which they hoped to carry out. The point upon which

the case turned was whether the plaintiff proceeded upon order from the defendants to build the ships for them according to the plaintiff's proposals, or at the plaintiff's own risk as to the ships being wanted for the enterprise. There was direct and positive testimony that the plaintiff proceeded upon the order of the defendants, which was corroborated by some circumstances, so that, although there was positive evidence to the contrary, the jury did not come to their finding without competent evidence. Neither was the verdict so against any great preponderance of evidence as to show that it was reached through passion, prejudice, or other improper motive, or want of consideration. The evidence upon the principal point was mostly oral and circumstantial. It was such as the parties had the right to have the jury weigh, and such as was very proper for the jury to weigh. As the parties had the right to have it weighed, so they have the right to have the result stand, unless error in law has intervened. Any other conclusion would impair the right to a trial by jury, guaranteed to all parties to such causes.

The greatest doubt as to the correctness of the rulings at the trial has arisen upon that part of the instructions to the jury to the effect that, if both parties did not mutually understand that the building of the ship was to be proceeded with for the defendants, upon their contract to take and pay for them, still if the defendants gave the officers of the plaintiff, who transacted the business, fairly to understand, as prudent men in the transaction of such business, that the plaintiff might go on and build the ships for them, and they would take them at the agreed price, the defendants would be bound. This was not intended to trench upon the necessity of a meeting of the minds of the parties to make a contract. The price and kind of ships was fully agreed upon. The question was whether the contract should be proceeded with. The plaintiff could only act upon what the defendants fairly gave its officers and agents to understand. If there was any miscarriage in expressing the mind of the defendants it would seem to be just that they should be bound by what they fairly expressed, whether they intended it as they expressed it or not. Poth. Obl. 19; Story, Cont. § 86; *Adams v. Lindsell*, 1 Barn. & Ald. 681. As, if they had told the plaintiff to build two ships, when they intended to say, and understood that they said, to build one, it would seem to be clear that they would be holden for the two. And if they told the plaintiff to go on and build the ships, it would seem to be equally clear that they would be bound, although they did not understand that they told the plaintiffs so.

Some point is made as to the correctness of the charge to the jury, to the effect that if the defendants told the plaintiff to stop the work the plaintiff would have the right to stop, and the defendants, if the work was proceeding on their order, would be holden for what had been done. The answer sets up, in substance, that the defendants did direct that the work should cease. There is no allegation or

proof that they ever requested that it should start again. They have not claimed that they were not liable because the plaintiff did not go on and complete the ships, but have rested their defense upon the ground that they never directed or requested the plaintiff to build the ships. Perhaps it would have been more strictly correct to have submitted nothing about the stopping of the work to the jury, but, if so, as this finding was in accordance with their admission of record, the error could not harm them.

No adequate ground for disturbing the verdict appears; the motion for a new trial must therefore be overruled. Motion denied, and stay of proceeding vacated.

UNITED STATES v. McDOWELL.

(District Court, S. D. New York. August 25, 1884.)

1. CUSTOMS DUTIES—APPRAISEMENT AND LIQUIDATION CONCLUSIVE—DEMURRER—REV. ST. §§ 2929, 2930, 2931.

The appraisement and liquidation of duties by the appraiser and collector are binding and conclusive in all collateral proceedings, and, in the absence of any reliquidation or reappraisement, cannot be disregarded or reviewed, except in the modes provided by sections 2929, 2930, and 2931 of the Revised Statutes. A suit in the district court is not one of those modes. *Held*, accordingly, on demurrer, that, after payment of the duties as liquidated, a suit for duties alleged to be due in excess of the liquidation, on account of an alleged untrue discount, fraudulently procured to be allowed in the appraisement of value, could not be sustained.

2. SAME—ACTION BY UNITED STATES.

The above rule, frequently applied in this court as against importers, must be equally applied in suits brought here by the United States.

3. SAME—REAPPRAISEMENT.

A reappraisement of value may be made without a re-examination of the goods themselves, where the items to be corrected, such as an alleged false discount in the invoice, do not depend on any inspection of the goods.

Demurrer to Complaint.

John Proctor Clark, Asst. Dist. Atty., for plaintiff.

Arnoux, Ritch & Woodford and *Wm. C. Wallace*, for defendant.

BROWN, J. This suit is brought to recover additional duties claimed to be due to the United States upon certain imported goods. The complaint charges that in the invoice and entry the importer falsely and fraudulently represented that a certain discount had been allowed upon the goods; whereas, in fact, no such discount had been made upon the invoice value. In the liquidation the alleged discount was allowed. In effect, this suit is for the purpose of recovering the duty on the amount of the discount alleged to have been improperly allowed in the liquidation. The defendant has demurred upon the ground that no cause of action is stated, inasmuch as there has been no reliquidation, and the duties, as it appears, have been paid in full, according to the only liquidation ever made.

Whether a discount should or should not be allowed, is a question belonging to the dutiable value of the goods. It has long been the uniform practice of this court to refuse to entertain any question concerning the dutiable value of imported goods, on the ground that it is for the general appraiser, the merchant appraisers, or the collector, as the case may be, as the tribunal specially established by law for that purpose, to pass finally and conclusively on all questions of value, for the purpose of the assessment of duties.

The statutes (sections 2930, 2931) making the appraisal of value and the liquidation by the collector "final," are as binding and conclusive upon the United States as upon the importer, except only that the government may, in certain cases, reappraise the goods and reliquidate the duties. The duties, when once fixed by a lawful appraisement and liquidation, become the duties and the only duties to which the goods are subject, until the amount as thus fixed is modified by some subsequent lawful appraisement and liquidation, or is lawfully brought in review by due protest, appeal, or suit in the circuit court according to section 2931. The statute itself declares that the goods "shall be liable to duty accordingly," i. e., as liquidated, and not otherwise. *Iasigi v. The Collector*, 1 Wall. 375, 388; *U. S. v. Cousinery*, 7 Ben. 255; *Watt v. U. S.* 15 Blatchf. 29; *Stairs v. Peaslee*, 18 How. 527; *Bartlett v. Kane*, 16 How. 263, 272; *U. S. v. Campbell*, 10 FED. REP. 818; *U. S. v. Earnshaw*, 12 FED. REP. 283, 286.

The conclusive character of such appraisements and liquidations rests not only upon the fact that the statute declares them "final," but also upon the additional general principle that the decision of special tribunals established by law for the determination of particular questions, when regularly made, are conclusive, and cannot be questioned or set aside collaterally, except in some mode specially provided by law. *Belcher v. Linn*, 24 How. 522; *Bartlett v. Kane*, 16 How. 263; *Clinkenbeard v. U. S.* 21 Wall. 65; *U. S. v. Arredondo*, 6 Pet. 729; *Rankin v. Hoyt*, 4 How. 335; *U. S. v. Campbell*, 10 FED. REP. 816, 818, 819; *U. S. v. Leng*, 18 FED. REP. 20, 22.

The present suit violates this general principle. It seeks to recover duties which have never been liquidated, and to review and set aside the only liquidation and appraisement ever made, by means of a suit in this court, which is not one of the instrumentalities provided by law for such purposes.

It is urged that where the goods have passed into consumption and cannot be brought anew before the appraiser, no subsequent appraisement or reliquidation of the duties can be had; and that, consequently, the government is without remedy other than by suit such as this. If that be so, it is for congress to supply the remedy. The case of *U. S. v. Frazer*, 10 Ben. 347, cited in support of this view, does not appear to have been a case of fraud, and the appraiser who reappraised the goods in that case had never seen the goods at all.

Without questioning the soundness of that case, as a general rule, it should not be applied where, as in the present case, the reasons for it do not exist, viz., where no further examination of the goods would be necessary in order to determine their dutiable value, and whether the alleged discount should be allowed or not, or for a proper reliquidation of the duties as dependent upon this discount. The language of the court in the case of *Frazer* is carefully guarded, and it is not necessary to determine whether that case should be applied where the importer has fraudulently entered the goods and removed them beyond reach before the fraud is discovered, and when the government officers still have other clear and certain means of determining the value of the goods. In the case of *Iasigi v. The Collector*, 1 Wall. 375, 383, while it was held that the appraisement and liquidation made by the officers were conclusive, so far as respects all collateral proceedings, it was further held that there might be a reappraisement by the officers themselves within a reasonable period. The collector is, by section 2929, expressly authorized to direct reappraisements, and to "cause the duties to be charged accordingly." As no further inspection of the goods in the present case is requisite in order to determine whether the alleged discount should be allowed or disallowed, there is nothing here to prevent such a reappraisement, if directed by the collector, and a reliquidation of duties accordingly.

The rule uniformly applied in this court, holding the appraisement and liquidation or reliquidation final in all such cases except on appeal or suit pursuant to section 2931, must be adhered to. Any other rule would transfer to this court the whole subject of the dutiable value of imported goods, and all those protracted examinations concerning value that have hitherto been confined to the appraiser's and collector's tribunal. To permit this would not, in my judgment, subserve the public interests, and would be contrary to the plain intent of the statute. On this very subject the supreme court, in the case of *Bartlett v. Kane*, 16 How. 272, say:

"The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassments. Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury months or even years after the articles have been withdrawn from the control of the government, and when the knowledge of the transaction has faded from the memory of its officers."

The court cannot act as appraiser or liquidating officer at the suit of the government, and refuse to do so at the suit of the importer; the same rule must apply to each, except in so far as the statute itself makes a distinction. In no case can the court disregard or correct an appraisal or a liquidation, except after protest and appeal under section 2931. As against importers this rule has often been applied. The same rule requires judgment for the defendant upon this de-

murrer. *U. S. v. Earnshaw*, 12 FED. REP. 283; *U. S. v. Bradley*, 25 Int. Rev. Rec. 75; *Westray v. U. S.* 18 Wall. 322; *Watt v. U. S.* 15 Blatchf. 29, 33; *U. S. v. Cousinery*, 7 Ben. 251; *Wills v. Russell*, 1 Holmes, 228.

WHITNEY and others *v.* ROBERTSON, Collector, etc.

(Circuit Court, S. D. New York. September 19, 1884.)

CUSTOMS DUTIES—TREATY—ACT OF CONGRESS—EXEMPTION FROM DUTY.

A stipulation in a treaty with a foreign power that "no higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominion of the treaty-making power, * * * than are or shall be payable on the like articles, being the produce or manufacture of any other foreign country," does not prevent congress from passing an act exempting from duty like products and manufactures imported from any particular foreign dominion it may see fit.

On Demurrer to Complaint.

Charles Stewart Davison, for plaintiffs.

Elihu Root, U. S. Dist. Atty., and *Saml. B. Clark*, for defendants.

WALLACE, J. The questions raised by the demurrer are the same considered in the case of *Bartram v. Robertson*, 15 FED. REP. 212, and for the reasons stated in the opinion there delivered the demurrer is sustained.

Judgment is ordered for the defendant.

HAYES *v.* BICKELHOUP, Sr.

(Circuit Court, S. D. New York. August 25, 1884.)

PATENTS FOR INVENTIONS—NOVELTY—PATENT No. 170,852.

The first and fifth claims of patent No. 170,852, granted December 7, 1875, to George Hayes, for an improvement in ventilating louvers, held void for want of novelty.

In Equity.

J. H. Whitelegge, for orator.

Arthur v. Briesen, for defendant.

WHEELER, J. This suit is brought upon letters patent No. 170,852, dated December 7, 1875, and issued to the orator for an improvement in ventilating louvers. There are five claims, the first and fifth of which are alleged to be infringed. A louver appears to be an opening in buildings crossed by a series of slanting slats to exclude rain and snow, and admit air. The patent describes a louver with

an outer reticulated covering and curved slats, called gutters, within, having flanges at the upper edges extending upwards, and at the lower edges extending downwards, both serving to stiffen the gutters, and the lower one for an attachment for the reticulated covering. The first claim is for the combination of the covering with the gutters, and the fifth is for the gutters themselves. These gutters are shown as slanting, and operating to shed rain or snow in the same manner as the slanting slats. The reticulated covering operates as a screen, precisely as it would if there were no slats. Neither operates any differently, or accomplishes any result in connection with the other different from what it would if the other was not there. They appear to form a mere aggregation, and not a patentable combination. *Pickering v. McCullough*, 104 U. S. 310; *Double-pointed Tack Co. v. Two Rivers Manuf'g Co.* 109 U. S. 117; S. C. 3 Sup. Ct. Rep. 105. Further, slanting slats performing the same office as these were a part of common knowledge,—their existence is assumed in the patent as a known part of a louver, on which the invention was set up as an improvement. A screen like the reticulated covering was also well known. There would not appear to be any patentable invention in putting the two to uses together for which each was before well known separately.

The flanges to the gutters for stiffening them were merely such additions as would be supplied by good workmanship when needed. They were not new for that purpose. And the use of the flange shape for attaching the reticulated covering would appear to be very obvious. These claims appear to be without sufficient invention to uphold them.

Let there be a decree dismissing the bill of complaint, with costs.

HAYES v. BICKELHOUP, Sr.

(Circuit Court, S. D. New York. August 25, 1884.)

1. PATENTS FOR INVENTIONS—REISSUES 8,674, 8,675—SKY-LIGHTS AND VENTILATORS.

The eighth claim of reissued patent No. 8,674, and the first, second, and seventh claims of reissued patent No. 8,675, for improvements on sky-lights and ventilators, are not to be found in the original patent, and are void.

2. SAME—REISSUE 8,689—VALIDITY—INFRINGEMENT.

The second and third claims of reissued patent No. 8,689, for sky-lights and ventilators, are not anticipated by any prior patents or structures, are valid, and are infringed by defendant.

In Equity.

J. H. Whitelegge, for orator.

A. v. Briesen, for defendant.

WHEELER, J. This suit is brought upon reissued patents Nos. 8,597, 8,674, 8,675, 8,688, and 8,689, granted to the orator for improvements in sky-lights and ventilators. They have been before the circuit court for the Eastern district of New York, (Judge BENEDICT,) and some of them before this court, (Judge COXE,) and all the claims alleged here to be infringed have been adjudged to be void, except the eighth of 8,674, the first, second, and seventh of 8,675, and the second and third of 8,689. *Hayes v. Seton*, 12 FED. REP. 120; *Hayes v. Dayton*, 20 FED. REP. 690. Of these, the eighth of 8,674, and the first, second, and seventh of 8,675, are not to be found in the original patents, but were added after the patents had stood nearly nine years without them, and are void for the reason given in these former cases as to other claims, which are concurred in and followed. There are left the second and third claims of 8,689. These claims in the re-issue appear to be the same as in the original. They are not shown to be anticipated by any prior patents or structures, and no good reason is apparent for adjudging them to be invalid. The third is for a sash swinging on pivots, having exterior and overlapping elastic flanges on the sides and bottom of the part of the sash swinging outward, forming an outer flashing for protection against storms. The alleged infringement appears to have such a flange at the bottom. In *Hayes v. Seton* there appears to have been no such flange on any part of the sash. There, no infringement of this claim was found; here, there appears to be an infringement to the extent of the use of this flange at the bottom of the sash.

The second appears to be infringed by the use of the combination of flanged covering strips in combination with hollow metallic posts for supporting glasses, as described in that claim. The orator appears to be entitled to a decree as to these two claims of this patent, and the defendant as to the residue of the claims in controversy; but, as neither prevails fully, without costs to either.

Let there be a decree for the orator for an injunction and account as to the second and third claims of No. 8,689, accordingly, without costs.

ELECTRIC GAS LIGHTING CO. *v.* TILLOTSON and another.

(Circuit Court, S. D. New York. September 18, 1884.)

PATENTS FOR INVENTIONS—REISSUE No. 9,743—ELECTRICAL APPARATUS FOR LIGHTING STREET LAMPS.

Claims 2 and 5 of reissued patent No. 9,743, granted to Jacob P. Tirrell, assignor, and dated June 7, 1881, for electrical apparatus for lighting street lamps, held invalid.

In Equity.

Edwin H. Brown, for orator.

Edward N. Dickerson, Jr., for defendant.

WHEELER, J. This suit is brought upon reissued letters patent No. 9,743, granted to Jacob P. Tirrell, assignor, and dated June 7, 1881, for electrical apparatus for lighting street lamps. The original patent was No. 130,770, dated August 20, 1872. The infringement complained of was made under patent No. 230,590, dated July 27, 1880, granted to the same Jacob P. Tirrell, assignor to George F. Pinkham, for an electric gas-lighting apparatus. One of the defenses is that the reissue is not supported by the original. The specifications of the original and reissue are precisely alike. The original had three claims; for—

“(1) A circuit-breaker, located at the burner and operated automatically, substantially as described. (2) In combination with the above, a lever adapted and arranged to open and close the stop-cock or valve of the burner, and carrying the circuit-breaker, substantially as herein described. (3) The arms, O², sector wheels, *f*, *n*, pins, U², *mm*², wires, M, N, magnet, E, lever, H, carrying the armature, G, circuit-breaker, *j*, and pawl, S, and the ratchet-wheel, R, all combined and arranged together, and applied to a gas-burner for operation, substantially as, and for the purposes set forth.”

The reissue has six claims. The first and sixth are for combinations not found nor claimed to be, in the alleged infringing device; the third is the same in each; and the fourth in the reissue is the same as the second in the original. There is in the alleged infringement no lever to open and close the stop-cock, and carrying the circuit-breaker to form the combination of the original second, now the fourth, claim; nor arms, sector-wheels, pins, pawl, or ratchet-wheel, to form the combination of the constant third claim. The only claims remaining, and the only ones relied upon here, are the second and fifth. They are for—

“(2) In an apparatus for lighting gas by electricity, the helix of an electro-magnet, connected at one end with the wire through which the current of electricity is passed, and at the other end with a circuit-breaker located at the gas-burner, so arranged that the current of electricity is passed to the circuit-breaker through said magnet, attracting an armature actuating mechanism operating automatically to turn on the gas and light the same by the effects of the primary sparks made at the tip of the burner from said magnet in the circuit. (5) In an apparatus for lighting gas by electricity, the combination of a wire through which a current of electricity is passed, actuating mechanism for letting on the gas, an electro-magnet electrically connected with said wire, an armature operated by said electro-magnet, mechanism actuated by said armature breaking the circuit at the burner tip and producing there an electric spark or sparks for lighting the gas, the whole operating automatically.”

These claims do not refer to any mechanism described for turning on the gas or breaking the circuit, but are drawn to apply to any mechanism operative in the proper connection with the parts described for those purposes. When the circuit is closed a current of electricity may be sent through the helix and around the circuit past the burner-tip. This will charge the helix with electricity, so that

it will attract the armature to itself. If any mechanism is attached to the armature, so that the motion of the armature will break the circuit at the burner-tip, a spark will be found there from the flowing current, but the current, if not too powerful, will cease. This will relieve the helix from the charge of electricity and the armature from its attraction, and leave the armature free to move away from the helix, and, by its motion through the mechanism, to close the circuit, when, if the supply of electricity is continued, the operation will be repeated. The motion of the armature may, by appropriate mechanism, be made to open and close the stop-cock, as well as to break and close the circuit. These claims seem to be intended and appropriate to cover this arrangement of the wires and helix in the circuit with the circuit-breaker, and with the armature moving by the force of the current, and some mechanism by which the motion of the armature will break and restore the circuit and move the stop-cock, without regard to the form of the mechanism. The parts necessary to be described are well enough described with the arrangement of the whole; the rest is left to the common knowledge of those skilled in such matters. *Loom Co. v. Higgins*, 105 U. S. 580. But this arrangement of these parts was not claimed anywhere in the original patent as a part of the invention. The first and second claims contained no allusion to the wires, helix, or armature; the third was for these and several other parts, *all* combined and arranged together, and applied to a gas-burner for operation, thus showing an intention to claim that particular combination of the whole. *Gage v. Herring*, 107 U. S. 640; S. C. 2 Sup. Ct. Rep. 819; *Clements v. Odorless Apparatus Co.* 109 U. S. 641; S. C. 3 Sup. Ct. Rep. 525. The original patent stood nearly nine years before these claims were made. The right under which the defendant operates had accrued before they were made. They cannot be upheld now, as this case, and the decisions made upon this subject, are understood. *Miller v. Brass Co.* 104 U. S. 350.

Let there be a decree that these claims are invalid, and that the bill be dismissed, with costs.

MILLIGAN v. LALANCE & GROSJEAN MANUF'g Co.

(Circuit Court, S. D. New York. August 29, 1884.)

1. PATENTS FOR INVENTIONS—ASSIGNMENT—REJECTION OF APPLICATION—AMENDMENT BY SOLICITOR—ISSUE OF AMENDED PATENT—VALIDITY—RECOVERY OF AGREED PRICE.

M. made an improvement in metal vessels for culinary purposes, consisting of a shoulder around the inside of the upper edge to support the lid, and assigned it to L. to procure a patent; and the application, being rejected for want of novelty, was amended by the solicitor to include an inclosed wire at

the extreme edge, and a patent having such a shoulder strengthened at the edge by the wire was issued to L., who made and sold at a profit vessels having the shoulder without the wire and vessels having both the shoulder and wire, and marked and claimed them all as patented. M. claimed a royalty on all the vessels sold under his contract with L. *Held*, that if the shoulder without the wire had been new, so that the patent would have covered that as a part of the patented invention, L. could lawfully control the monopoly of the shoulder only; but that when the claim for that alone was rejected, and such rejection acquiesced in, it could not be claimed that the patent covered that alone; that while as to the public the patent would be void because M. did not invent the wire, and the act of the solicitor in inserting it was unauthorized, the relations of M. and L. were governed by their contract, and that M. was entitled to recover as claimed.

2. SAME—VERDICT—EVIDENCE.

Upon examination of the evidence the verdict in favor of plaintiff is sustained.

At Law.

R. Robertson, for plaintiff.

Abram Wakeman, for defendant.

WHEELER, J. The plaintiff was in the employ of the defendant, and made what they supposed to be an invention of a new and patentable improvement in sheet-metal vessels for culinary purposes, consisting of a shoulder around the inside of the upper edge to support the lid. He assigned it to the defendant to procure a patent upon it and practice it. The defendant applied for a patent; the application was rejected for want of novelty; the solicitor amended it to include an inclosed wire at the extreme edge, and the patent No. 189,250, dated April 3, 1877, was granted for such a vessel, having such shoulder, strengthened at the extreme edge by such a wire. The defendant made and sold large quantities of the vessels, at a considerable profit, which had the shoulder without the wire, and some at some profit having the shoulder and wire, and marked them all as patented, with the day and year of this patent, and claimed to be operating under it, and this claim was respected. Upon the trial the plaintiff claimed that the assignment was made upon an agreement by the defendant to pay him a royalty on the goods manufactured and sold under the patent, to be afterwards ascertained; and the defendant claimed that it was assigned pursuant to the terms of his employment, and was not to be paid for except gratuitously; that the patent does not purport to cover the shoulder without the wire, and that it is void as to what it does purport to cover, on account of the change made by the solicitor, and otherwise, so that there was no basis for a royalty. The jury found for the plaintiff on this issue, and stated the proportion of profits to which they found the plaintiff entitled, under a stipulation of the parties. The defendant now claims that the verdict should be set aside because not warranted by the evidence, and because, with the finding in his favor, the plaintiff is not entitled to recover.

As to the finding, it seems to be sufficient now to say that the evidence rested almost wholly in parol; that there was enough on either

side to well warrant a finding that way, if there had been none on the other; that the determination of the question depended upon the credibility for truthfulness and accuracy of the witnesses, all of which was within the peculiar province of the jury, who, so far as appears, considered the question fairly, and decided it according to their best judgment. This was their duty, and, when so performed, the court has no disposition or authority to review their work. The other is the more important question. If the shoulder without the wire was new, so that the patent would cover that as a part of the patented invention, the defendant might lawfully control the monopoly of the shoulder only. *Sharp v. Tift*, 18 Blatchf. 132; S. C. 2 FED. REP. 697. But when the claim for that alone was rejected, and the rejection acquiesced in, it could not afterwards be successfully claimed that the patent covered that alone.

The patent issued covered vessels having both the shoulder and wire, but as the inventor did not invent the wire, the act of the solicitor inserting it would seem to be unauthorized, and the patent, as to the public, void. *Eagleton Manuf'g Co. v. West, etc., Manuf'g Co.* 111 U. S. 490; S. C. 4 Sup. Ct. Rep. 593. The patent was invalid, apparently, but that does not settle the rights of these parties growing out of their contract. Both acted in respect to it as good. The real question now is whether the fact of the invalidity is a good answer to this action upon the contract. The relation of the parties in respect to the patent became similar to that of licensor and licensee. The defendant held the legal title to the patent, but held it to use and pay for the use. The price was not expressly agreed upon, but the law will imply a reasonable price, and the question is the same as if there had been an agreed price. Had the plaintiff retained the title to the patent, and the defendant taken a license for an agreed royalty, and then practiced the invention exactly as has been done, the fact of the invalidity of the patent would have been no defense to a suit for the royalty. *White v. Lee*, 14 FED. REP. 789; *McKay v. Jackman*, 17 FED. REP. 641. The defendant has had and enjoyed what was contracted for, and it is no answer to say that the same might have been had without the contract. The defendant could not both stand upon the patent and repudiate it, nor upon the plaintiff's title to the invention and repudiate that.

The motion for a new trial is overruled, and the stay vacated.

UNDERWOOD v. WARREN and another.¹*(Circuit Court, E. D. Missouri. September 17, 1884.)***PATENTS—ESTOPPEL.**

A patentee is estopped, as against an assignee, to claim, in a suit for an infringement, that the patent assigned is invalid.

In Equity. Exceptions to parts of answer.

This is a suit for the infringement of a patent on an improvement on railroad-track drills, invented by the complainant. The bill alleges, in substance, that the patent claimed to have been infringed was issued to the complainant, and Andrew Warren and Perrin G. March, the defendants, while they were doing business together as partners; that their partnership was subsequently dissolved, and that upon its dissolution Warren and March assigned their interests in said patent to complainant for a valuable consideration, and that he then became, and still remains, its sole owner, and that since said assignments were made to complainant the defendants have manufactured and sold infringing machines, and still continue to do so.

The answer alleges, in substance, that complainant's patent is invalid. To this the complainant excepts, and raises the point that the defendants are estopped to deny the validity of said patent.

G. M. Stewart, for complainant.

Parkinson & Parkinson, for defendants.

TREAT, J. The bill alleges that the Underwood patent was issued to Underwood, Warren, and March, each one-third interest. It also avers sundry transactions between the respective parties, whereby said Warren and March conveyed all their interest therein to plaintiff for full consideration. This court, at its last term, examined at length all of the points substantially involved,² and held that the respective parties defendant were estopped from disputing the validity of plaintiff's right.

The exceptions, without resort to verbal criticism, are directed to the question of estoppel, and, under the allegations of the bill and answer with respect thereto, the ruling of this court, in the light of authorities there cited, must prevail, and the exceptions be sustained.

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

²See *Rumsey v. Buck*, 20 FED. REP. 697.

McLAUGHLIN v. PEOPLE'S RAILWAY Co. and another.¹

(Circuit Court, E. D. Missouri. September 19, 1884.)

PATENT—SUIT FOR INFRINGEMENT—LACHES—DEMURRER.

Bill for infringement of patent, alleging unauthorized construction and use of patented invention by defendant for 13 years, and making no excuse for complainant's failure to assert his rights during that period, *held* demurrable.

In Equity. Demurrer to bill for infringement of a patent.

Jones & Delano, with *F. X. McCabe*, for complainant.

Paul Bakewell, for People's Railway Company.

BREWER, J. The bill charges that letters patent for a street-car gate were issued to the complainant and one J. F. Madison on August 3, 1869; that neither of said patentees ever licensed or granted to defendant the People's Railway Company, or any one else, the right or privilege to make or use said gate, and that said defendant railway company is now, and has been for 13 years last past, using and constructing such patented street-car gates upon its street cars. The prayer is for injunction and accounting. The single question which I deem necessary to consider is whether there has been such laches on the part of complainant as will prevent a court of equity from taking cognizance of this suit. The bill shows no excuse for his delay; neither ignorance of the conduct of the defendant, nor inability on the complainant's part to assert his rights. It is left upon the naked assertion that the patent, existing for now over 15 years, the defendant has for 13 years been infringing thereon.

Under these circumstances, whatever action at law he may have for damages, I think his own laches such as prevents a court of equity from interfering by injunction. That the general principles of equity jurisprudence control in patent cases cannot be doubted. Rev. St. § 629, par. 9; also, section 4921, which last section contains these words:

"The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions *according to the course and principles of courts of equity*, to prevent the violation of any rights secured by a patent, upon such terms as the court may deem reasonable."

Now, generally speaking, the laches of complainant is sufficient ground for non-interference on the part of a court of equity. Nearly all the life-time of this patent the complainant has remained silent, by his silence consenting to, or at least acquiescing in, the acts of the defendant. To interfere now by injunction would seem manifestly inequitable. That this question of laches can be raised by demurrer, and that it is a good defense to a bill in equity, is abundantly sustained by the authorities. In Walk. Pat. § 597, it is said:

"The defense of laches can be made in a demurrer, or in an answer, or in an argument on the hearing, without any pleading to support it. But a

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

plea is not appropriate in such a defense; because, if the bill shows delay and is silent about excuses therefor, the method of a plea would be to state that there is no such excuse, and because, by taking issue on such a plea and framing an excuse, the complainant could cut off all excuses and win the case. To guard against a demurrer based on laches, in a case where long delay intervened between the infringement and filing of the bill, the bill ought to state the existing excuses for that delay; and, to guard against such defense being started on the hearing, the evidence ought to show whatever excuse the complainant can interpose."

See, also, the following authorities: *Maxwell v. Kennedy*, 8 How. 222; *Lewis v. Chapman*, 3 Beav. 133; *Saunders v. Smith*, 3 Mylne & C. 711; *Collard v. Allison*, 4 Mylne & C. 487; *Wyeth v. Stone*, 1 Story, 273; *Root v. Ry. Co.* 105 U. S. 215; Curt. Pat. § 440, in which the author says:

"Where a patentee seeks an injunction against an alleged infringer, and the evidence shows that this infringer, or others, have been in the habit of disregarding the exclusive right conferred upon the patentee, and this with knowledge, either actual or implied, on the part of the patentee, the court will dismiss the bill on the ground that the complainant has been guilty of laches, or that there is a want of that exclusive possession which lies at the foundation of every claim for an injunction."

These authorities enforcing the general rule of equity jurisprudence compel the sustaining of the demurrer. The order, therefore, will be that the demurrer be sustained and the bill dismissed.

GOODWIN v. RANDOLPH.

SAME v. SAME.

(Circuit Court, D. New Jersey. September 27, 1884.)

PATENTS FOR INVENTION—INFRINGEMENT—HARVESTERS—ROCK-SHAFTS.

The fourteenth claim of the patent granted to William Farr Goodwin for an improvement in harvesters, bearing date April 18, 1876, construed, and held, that the pivoted rock-shaft therein claimed is not infringed by the rock-shaft and lever in the machine sold by defendant.

On Bill, Answer, and Proofs. Final hearing.

W. F. Goodwin, plaintiff *pro se*.

BRADLEY, Justice. The bills of complaint in these cases are founded on certain letters patent issued to the complainant, bearing date the eighteenth day of April, 1876, for new and useful improvements in harvesters, which, it is alleged, the defendants have infringed; and the prayers of the bills are for an account of profits, and a perpetual injunction against further infringement. The specification of the patent sets forth and describes several devices connected with harvesters, which are alleged to be new, and which are the subject of 17 different claims. The device in question in the present case, alleged to be

infringed by the defendants, is that which is the subject of the fourteenth claim, which reads as follows: "In combination with the cutter-frame, the pivotal rock-shaft, *s*, *s*⁴, and a tilting lever attached to and actuating the rock-shaft, substantially as set forth." The infringement of the invention thus claimed is the sole subject of controversy. The "pivotal rock-shaft," referred to in the fourteenth claim, is not clearly described in the specification, and is only partially exhibited in the drawings attached thereto; but its position and operation are so far pointed out that we may infer its form; and, to demonstrate it more fully, the complainant has put in evidence a model, which he alleges to be a true exhibit of the invention.

The principal object of the apparatus in question is to give the cutting device of the harvester a rocking motion, so that the points of the guards or fingers and of the cutters may be raised and lowered as the unevenness of the ground, or protuberances upon it, may require, without raising or lowering the bars themselves. It is evident that if the cutting apparatus (including the finger bar and cutting bar) were attached to a frame or head-piece, so pivoted, or so loosely attached, to the main frame of the machine as to allow of a rocking motion, such motion could easily be communicated by a simple hand-lever attached to such frame or head-piece, and extending upward and backward, so as to be within reach of the driver; and this method was resorted to in several machines constructed prior to the complainant's invention, differing from each other principally in the mode of attaching the lever to the head-piece, or "cutter-frame," as it is called in the patent. Sometimes the lever would be attached to a yoke, sometimes it would be bent in various ways, so as to pass around other parts of the machinery, and not to interfere with their working, nor be prevented from having its own proper movement. The device of the complainant consists in attaching the lever, not to the cutter-frame itself, but to one end of an intermediate rock-shaft situated below and out of the way of the other machinery, and imparting the rocking motion desired to this rock-shaft, the other end of which is connected with the cutter-frame by a peculiar pivoted arrangement, and the motion given to the rock-shaft is thus communicated to the cutter-frame, and, consequently, to the cutting apparatus. The pivotal arrangement referred to consists of the end of the rock-shaft turned to a right angle with the axis of the shaft, enlarged near its end into a globular shape, and terminating in a pivot, on which the cutter-frame is mounted; the globular enlargement resting in a standard provided with a slot for its reception. It is secured in place by a pivot passing through the globular enlargement, and allowing it to vibrate up and down when operated by the rocking motion of the rock-shaft.

This is the pivoted rock-shaft mentioned in the fourteenth claim. The lever attached to it, and by which the driver operates it, has three distinct parts. That held by the hand of the driver is above the

main frame of the machine; the second portion passes downward through the frame, at right angles with the first, and has notches on its side, making a ratchet to hold it in any position; the third part extends from the lower end of the second, under the main frame, to the rock-shaft. The three sections are rigidly fixed to each other, forming one rigid lever. This is the "tilting lever" referred to in the fourteenth claim. The whole thing, though not specifically described, is referred to in the specification as follows. After describing the cutter apparatus, with its lugs or ears containing pivot holes, or "circular bearings," the specification proceeds thus:

"The rear lug, S^1 , is mounted upon one end of a pivoted rock-shaft, s^1, s^4 . T, T^1, T^2 , is a finger-bar lever, attached to the inner end of the pivoted rock-shaft, s^1, s^4 . The parts, T, T^2 , of the lever are in substantially parallel planes, and are connected by an intermediate section, T^1 , arranged at about a right angle to the parts, T, T^2 , and provided with ratchet teeth, t . That part of the rock-shaft which is shown in section in figure 2 is expanded centrally into a globular bearing, and is seated in a recess in an arm, b^5 , of the main frame, and is pivoted to this arm for a further support; the inner end, s^4 , being supported in a bearing upon the under side of the frame, but not shown. The object of making this inner end curved is to bring that point which rests in the last-mentioned bearing into a line coincident with the pivot, s^5 , so that when the rock-shaft is actuated by the lever, T, T^1, T^2 , to rock or tilt the cutter-frame, as indicated by the dotted lines, y , figure 2, there shall be no cramping of the parts."

Thus we see that the thing claimed is the pivoted rock-shaft, with the tilting-lever attached to it at one end, and the lug of the cutter-frame mounted on it at the other end, having the end next to the cutter-frame enlarged into a globular bearing, resting in a slot or recess in a standard or arm of the main frame. Now, do the defendants infringe the patent for this invention? We have before us one of the machines sold by the defendants, and also a model of it made for more convenient inspection. Looking at its arrangement for producing a rocking motion in the cutting apparatus, we find, it is true, a rock-shaft, and a lever attached to one end of it; but we do not find the other end of the rock-shaft expanded into a globular bearing, nor do we find the cutter-frame mounted upon it; on the contrary, we find the other end of the rock-shaft provided with an arm projecting therefrom at right angles, and moving up and down, as a rocking motion is imparted to the rock-shaft. To the end of the arm is attached a link which connects it with a pin, forming the bearing on which the cutter-frame is mounted. This pin is held in a standard, or upright arm of the main frame, in a slot or hole vertically larger than the pin, so as to allow the pin to vibrate up and down, and communicate the rocking motion to the cutter-frame.

Notwithstanding the want of conformity between this device and that of the complainant, I should probably think that the one was substantially the equivalent of the other, if the complainant had been the first to apply the rock-shaft as an auxiliary instrumentality in producing the desired rocking motion of the cutting apparatus. But

he was not. Without referring to any other previous invention, that of William N. Whitely, described in letters patent granted to him and dated November 24, 1868, contains a rock-shaft used for the very purpose for which the complainant's is used. The only merit of the complainant's invention is the peculiar form of his rock-shaft and the peculiar mode of applying it. He is not a pioneer in this department of machinery. He did not invent the rocking motion as a process, nor the first means of producing it, nor the mode of producing it by the intervention of a rock-shaft. He does not stand at the head of the line; he is only an individual in the line. He is entitled to what he has invented and nothing more; and what he has invented is nothing but the specific device which he has patented. His claim is to be construed according to its terms, and is limited by them, and cannot be enlarged by construction. I am of opinion, therefore, that the defendants do not infringe the complainant's patent, construed, as it must be, in accordance with the decisions of the supreme court on this subject.

The complainant supposes that his patent has a broader application than that which is now given to it, because he can apply a lever directly to the enlarged globular bearing, and he exhibits such a lever as an alternative in his model. But by this arrangement he dispenses with his auxiliary rock-shaft, which is the very subject of the fourteenth claim, and of the description which was copied from the specification. It may be that the other portions of his patent are independent of the rock-shaft, and that they may stand good with the use of a lever applied directly to the globular bearing; but the fourteenth claim is based entirely on the rock-shaft, and cannot have any force or meaning except as applied to it. It is unnecessary to examine the various patents that have been put in evidence. They exhibit the state of the art in detail, as already referred to in general terms. I am clear, from this exhibit, that the complainant is confined to the specific device which he has described and claimed, and that the machines sold by the defendants do not contain it.

The bills must be dismissed.

NEWBURY and others v. MOSSMAN.

(Circuit Court, S. D. New York. September 25, 1884.)

PATENTS FOR INVENTIONS—TIME-LOCK—INFRINGEMENT.

Infringement of patent No. 262,094, granted to Henry F. Newbury, August 1, 1882, for an improvement in time-locks, *held* not shown, and preliminary injunction refused.

In Equity.

Samuel A. Duncan, for orators.

Edmund Wetmore, for defendant.

WHEELER, J. The clock-work of time-locks regulates the movements of machinery to make way for the lock-bolt in unlocking, so that way will be made at the proper time and not sooner. If the delicate or other parts of the time movements are broken or displaced, so as not to hold the machinery, it will run down at once and free the bolt. The orator's patent, No. 262,094, dated August 1, 1882, and granted to Newbury, is for an improvement in such locks by which some part of the mechanism between the power and the bolt shall be made yielding by a spring, so as to disconnect there more readily than the time movement will, and leave the bolt fast in case of a shock to the lock from the outside. There are two claims, one of which is for the combination of the connecting mechanism, "some part of which is made yielding for the purpose of interrupting the operative continuity of the mechanism under the force of a shock" with other parts of the lock; the other is for the same combination, with the addition to the parts of a device for holding the parts out of engagement when disconnected. The alleged infringement consists in making the connection between the plates of the clock-work more firm, moving the yoke-lever, by which pins on the dials make way for the lock-bolt away from the front of the dials to make room for throwing them forward out of place and disconnecting them, and weakening the screws by which they are attached to their arbors to make them more easy to be removed from their places by a shock from without.

Strengthening the parts about the clock-work might make the other line of mechanism comparatively more likely to yield to a shock by making this line less so, but that would not of itself seem to be an infringement of the patent, which is for making one of a set of parts yielding, and not for making another of another set unyielding. Removing the yoke-lever out the way of a forward movement of the dials does not appear to be new with the defendant's locks made since this patent. Locks were made with the yoke-lever back of the dials long before the patent and before the invention.

The most important question is whether the dials are a part of the mechanism made yielding for the purpose of disconnecting under the

force of a shock, within the meaning of the patent. They are in their former places, fastened by the same form of fastening, but made weaker, and perhaps made so for the purpose of being made to appear liable to disconnect in case of a shock. But there is no evidence that they will so yield. They are fastened by a screw, apparently made to hold, and which cannot yield to the force of a shock without being stripped of its threads. The threads are small, but the dials are light, and it does not seem as if any shock that would not shatter the whole structure of the lock would give the dials momentum enough to strip the screws out of their threads. Without proof that a shock would so operate there is not sufficient proof to warrant granting a preliminary injunction.

The motion is therefore denied.

NEW PROCESS FERMENTATION CO. v. KOCH.

(Circuit Court, E. D. Michigan. May 5, 1884.)

1. PATENTS FOR INVENTIONS—MACHINE—PROCESS—EXTENT OF USE.

Where a patent clearly shows and describes a machine whose use necessarily involves the production of a certain process, no other person can afterwards patent that process. The first patentee is entitled to his mechanism for every use of which it is capable.

2. SAME—RESULTS OF APPARATUS NOT FORESEEN.

That an inventor, when he perfected his apparatus, did not foresee all its results, will not invalidate a patent, since he is entitled to its use for every purpose to which it is adapted.

3. SAME—FOREIGN PUBLICATIONS—REV. ST. § 4886.

Patented inventions cannot be superseded by the mere introduction of a foreign publication of a similar device, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent.

4. SAME—DRAWINGS—DESCRIPTION.

Drawings alone, unaccompanied by letter-press description, will never invalidate a patent.

5. SAME—BUSINESS CIRCULARS.

Business circulars, which are sent only to persons engaged in the trade, are not such publications as the law contemplates in Rev. St. § 4886.

6. SAME—PROCESS FOR MAKING BEER—ANTICIPATION—BARTHOLOMAE PATENT, No. 215,679—PFAUDLER PATENT.

Letters patent No. 215,679, issued May 20, 1879, to George Bartholomae, as assignee of Leonard Meller and Edmund Hoffman, of Germany, for an "improvement in processes for making beer," held anticipated by patent issued July 2, 1878, to John M. Pfaudler.

In Equity.

This was a bill in equity for an infringement of letters patent No. 215,679, issued May 20, 1879, to George Bartholomae as assignee of Leonard Meller, of Ludwigshafen on the Rhine, and Edmund Hoff-

man, of Mannheim, Germany, for an "improvement in processes for making beer." This improvement was first patented in France, to Leo Meller & Co., November 30, 1876, and on February 28, 1877, a Belgian patent was issued to the same parties. These two were mechanical and not process patents. In 1877, George Bartholomae, president of the plaintiff corporation, went to Europe, and saw the invention, both the apparatus and process, in Hoffman's brewery at Mannheim. Returning in July of that year, he had a similar apparatus put up in his brewery at Chicago, early in August. He then, by agreement with Meller & Hoffman, applied for and obtained a patent in his own name, April 2, 1878, No. 201,982. Learning that this patent was invalid, he applied for and obtained a new one in the name of Meller & Hoffman, May 20, 1879, which was assigned to himself and is the basis of this suit. The plaintiff derives its title by assignment from Bartholomae, its president.

The patent applies to the last stages in the manufacture of beer, and covers (1) a new process or art intended to *hasten the clarification of the beverage* and its readiness for the market. Claims 1-5. (2) A new process tending to *equalize the fermentation* in a series of casks, giving thereby *more uniform character and effervescence* to the product. Claims 6, 7. (3) Certain mechanical means said to be best adapted in practicing the new art of treatment. Claim 8.

The specifications begin with a short statement of the process of brewing, and detail the disadvantages which the invention is designed to obviate. It then states that the invention consists in treating the beer at any stage of its manufacture by holding it "in one or more closed casks under automatically controllable carbonic acid gas pressure, generated either from the mild fermentation of the beer, or artificially."

The first, second, third, sixth, and seventh claims only are involved in this suit.

The defense to the first, second, and third claims, which are broadly for the process of preparing beer for the market *by holding it under controllable pressure of carbonic acid gas* when in the krausen stage, is want of novelty; and to the sixth and seventh claims, which differ from the others in applying this process to a *series of closed connected vessels* under automatically controlled pressure of carbonic acid gas, as before described, is the anticipatory device of what is known as the Pfaudler invention, shown and described in the patent to John M. Pfaudler, issued July 2, 1878. This patent is now owned by the Pfaudler Process Fermentation Company, of Rochester, New York, which has assumed the conduct and control of this defense. So that the controversy, although in form a mere infringement suit against the defendant, is really a contest between the plaintiff and the Pfaudler Company.

P. C. Dyrenforth, F. W. Cotzhausen, and Banning & Banning, for plaintiff.

W. W. Leggett and George H. Lothrop, for defendant.

BROWN, J. In the view we have taken of this case, it will not be necessary to pass upon the intrinsic validity of the plaintiff's patent as a process patent, or to determine whether the first three of Meller & Hoffman's claims are anticipated by the numerous English and American patents which have been put in evidence. These questions have been argued before the learned circuit judge for the Seventh circuit, and are now pending before him for decision upon a case arising in the district of Indiana.¹ This case has been argued as if it were solely a controversy between the Meller & Hoffman and the Pfaudler patents, and in this connection we propose to consider it.

Conceding to the fullest extent the doctrine laid down for the guidance of the profession in *Corning v. Burden*, 15 How. 267; *Cochrane v. Deener*, 94 U. S. 787; and *Tighlman v. Proctor*, 102 U. S. 722, that a process may be patented as a "useful art," and that another may invent and patent a machine by which this process may be perfected, and that each may be entitled to his patent, and that neither can use the process or machine of the other without a license from him, it cannot be possible that one may not invent a machine designed and effective to carry out a certain process and yet be treated as infringing a subsequent process patent. In other words: If A. has invented a machine for carrying out a certain process, and has taken out a mechanical patent, he cannot be deprived of the use of such machine by B., who has subsequently taken out a process patent for the manufactured article. The rights of parties cannot be determined by the form in which they have chosen to take out their patents. Indeed, we understand the law to be that, where a patent clearly shows and describes a machine whose use necessarily involves the production of a certain process, no other person can afterwards patent that process. The first patentee is entitled to his mechanism for every use of which it is capable. As said by the supreme court in *Roberts v. Ryer*, 91 U. S. 150, 157:

"It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not." See, also, *Stowe v. City of Chicago*, 21 O. G. 790.

The sixth and seventh claims of the Meller & Hoffman patent cover the process of holding beer in a series of closely connected vessels under automatically controllable pressure of carbonic acid gas. The only new result secured by these claims over that described in the first three claims is that by connecting a number of casks, in each of which the beer is fermenting, by a tube, the fermentation is equalized, and the beer in all the casks comes out alike, without depending on the judgment of the brewer, as is the case when the casks are bunged separately. No objections are taken to the validity of these

¹ See *New Process Fermentation Co. v. Maus*, 20 FED. REP. 725.

two claims, unless they are anticipated by the invention of Pfaudler, as above stated.

We are thus brought to the consideration of the Pfaudler patent. This is an American patent, and describes an apparatus for registering pressure in fermenting vessels very similar to the mechanism employed by the plaintiff, and apparently effecting the same or nearly the same result. In 1872, John M. Pfaudler, of Rochester, New York, a young and not a particularly intelligent German, inexperienced in the art of brewing, and a box-maker and carpenter by trade, conceived the idea of regulating the pressure in a vessel containing wine. To use his own words:

"I ground up the grapes, put it into open barrels, and waited until the fermentation started into it. This is the first fermentation. And then, after that, I pressed the grapes, ran off the juice, and after that I put it into air-tight barrels, to regulate this gas that is caused by this second fermentation, and settled the yeast. And then I went to work and put an apparatus on there—some kind of an apparatus, of a water column and pipe—to settle the yeast, to keep the barrels from bursting and keep them air-tight, and to stop this overflow of the wine or anything."

This was done in his father's cellar in Rochester. The casks were not connected, and the apparatus consisted of a pipe rising from the bung, and then another running down into a vessel containing water. "You could make that pipe or column as high as you wanted it, and the pipe as long as you wanted it; the higher you made the column, and the longer the pipe, the more pressure you could keep back onto the wine or liquor. The more water you put in that column, the more pressure you could keep back." He used two on wine casks and one on a cider cask in 1872. This apparatus he used from 1872 to 1874 without change, but he says he contemplated a change by "connecting the casks together and putting up a large water column five or six feet high, so as to keep back more pressure, so as to refine it still quicker and better," and to avoid the expense of putting a gauge on every barrel, for by connecting them together, if one of them would ferment faster than the other, it would equalize on all the barrels throughout. In the fall of 1874 he says that he explained to one Mitchell what he was going to do, and that he "wanted to connect the casks all together and use only one water column;" that he told him he was going to work at it at once and he could see it in a few months, and that he showed it to him the next spring. In this he is corroborated by Mitchell, who says that he saw Pfaudler's apparatus on a single cask in 1872 and in 1873; that in 1874 Pfaudler explained to him his connecting apparatus and said it would be the "boss" thing for breweries; and in the spring of 1875 he began to improve his apparatus, showed witness the various parts as he completed them, and finally showed him the completed apparatus in operation. He produced the original device in evidence, described it, and made it an exhibit in the cause. Early in 1876 Pfaudler's father died, and Pfaudler was unable to get money to construct a model and apply for a

patent except as he could save up a little at a time. The date of his death is fixed at about February 6, 1876, by the production of the receipt of the undertaker, and of the mason who supplied the headstone placed at his grave. Mr. Mitchell says in this connection that he knows that this apparatus was used upon connected casks before Pfaudler's father died, which would place it in the autumn of 1875 or early in the following winter. Pfaudler's testimony is also corroborated by that of his brother Caspar, who states that before his father's death he knew that John was using his apparatus in the cellar, and that it was then attached to four barrels, and that he then heard John explain the apparatus to his father. This was nearly two years before the Meller & Hoffman apparatus was put up in the Bartholomae brewery.

In March, 1878, Pfaudler began to buy materials, as fast as he could spare the money, for a model for the patent-office. In May, 1878, he paid Munn & Co. \$65 to apply for a patent. This is proven by their receipt. In his testimony he relates how the Pfaudler family saved the money to construct the model and apply for the patent. He and his brother Charles supported the family, and his brother Caspar's earnings were drawn on as lightly as possible to accumulate a fund. But they were obliged to use a part of the money, and it took about two years to save enough to take out the patent. He explained the matter to Munn & Co., signed the application, and supposed everything was right. He swears that he never heard of the use of an apparatus by which the casks were connected as by his own, until the autumn of 1877, when he was told by his brother Caspar that he, Caspar, was helping to put up some piping in the Bartholomae brewery; that the beer casks were connected the same as he had connected them in the cellar, "but as to the other parts where the pipes led to, he did not know how that worked." It was boxed up, but at the same time he thought it was for the same purpose that he intended to use his for, as near as he could judge. When told, he stated he didn't care what they had done; that he was going to get his patented as quick as he could move himself about money matters; that after his own patent had been granted he heard from Caspar that the water column and gauge were about the same as his own. After the patent was obtained, his mother mortgaged the house for \$500 to furnish money to work with. He claims to have used the water column to work with in 1875, and from the subsequent fall and up to and including 1881. His testimony is also corroborated by that of one Colman, a manufacturer of brass goods, who testifies that Pfaudler came to him in the spring of 1878 to have some work done. At first he wanted two safety-valves made, and shortly after brought in a drawing of a model he wanted to have made. The gauges were made about March 1, 1878, and the drawing was delivered about the same time. An entry on his books shows a charge in connection with this work on March 19th. The drawing and model

made from it are just like the drawing in the Pfaudler patent. The model was completed May 23, 1878. In June he made application for his patent upon this model, and on July 2, 1878, the patent was issued.

It is undeniable that this story is open to grave suspicion. The singular coincidence of Pfaudler's invention with the introduction of the Meller & Hoffman apparatus in Bartholomae's brewery in Rochester; the fact that his brother Caspar had been employed in assisting to put this apparatus in the brewery; that his mother was engaged in cleaning up the office and keeping the beds in order for the men at the same brewery; and the further fact stated by Dr. Frings, one of the experts, that only a man thoroughly conversant with the art of brewing, practically as well as scientifically, could make and apply the Meller & Hoffman process,—seem to render it very improbable that an ignorant young man, not even a brewer by trade, and apparently destitute of scientific knowledge, could have conceived and carried out a plan which had escaped the attention or baffled the ingenuity of the most experienced brewers for centuries. At the same time, there is no attack upon his credibility, or upon his character, or upon that of his family and his witnesses. It is true, his brother Caspar was employed in putting up the piping in the Bartholomae brewery in Rochester, but this was two years after he claims to have perfected his own invention; and Caspar claims that these pipes ran into a box that was kept locked, so that he could not see what was in it, and he never did see what was in the box. Indeed, none of the men in the brewery knew what was in the box to which the Meller & Hoffman apparatus was connected. Some thought there was an air-pump, and others thought it was a gas-machine. The fact that Pfaudler's mother was employed as a charwoman in the same brewery seems to me of little importance, as she had no opportunity to examine the apparatus, is evidently childish, and was not sworn in the case. If these witnesses are to be believed, it is highly improbable, if not impossible, that Pfaudler could have obtained a knowledge of the Meller & Hoffman process from this brewery, and if fraud had been in contemplation by Pfaudler's friends, it seems to me they would have chosen a very different person to carry it through for them. Under all these circumstances, and in view of the corroboration of some of the incidental portions of his testimony, I do not feel at liberty to cast it aside and to say that it is so improbable that it is unworthy of belief.

It is true that Pfaudler seems to have used his apparatus solely for the fermentation and clarification of wines and cider, or to prevent the bursting of the barrels, and to have had a very faint idea of the important part it was destined to play in the manufacture of fermented liquors; but as it seems to be equally applicable to the manufacture of beer, and is claimed in the patent to be adapted to that purpose, I see no valid reason why it does not anticipate the patent

of Bartholomae, which was issued April 2, 1878, inasmuch as it seems to accomplish the same result. That Pfaudler, when he perfected his apparatus, did not foresee all its results (and herein I coincide with the view taken by the plaintiff) will not invalidate the patent, since he is entitled to use it for every purpose to which it is adapted. Walk. Pat. § 38; *Ex parte Hicks*, 16 O. G. 546.

The same observations will apply to the claim now made by plaintiffs that Meller & Hoffman made a new invention in limiting the use of their apparatus or process to the krausen stage of the manufacture. If this or any similar apparatus had been in use at any stage in the process of beer-making, it is certainly no invention to apply it at any prior or subsequent period in the process of manufacture.

But by way of reply to the defense of prior invention by Pfaudler, it is the plaintiff's claim that it was not until long after Meller & Hoffman had sent their printed circulars into this country, and thus published their invention, that Pfaudler ever perfected his device by applying it to connected casks. The position of the plaintiff, in this connection, is that the sending of the circulars into this country, for the purpose of introducing the invention, entitles Meller & Hoffman to protection back to the date of their arrival, which it appears was sometime prior to September 9, 1874. To destroy the validity of this patent, it must be shown that the invention was not patented or described in any printed publication, in this or any foreign country, before the patentee's invention or discovery thereof. Rev. St. § 4886.

The Meller & Hoffman device was patented in France on November 30, 1876, but defendant claims to have perfected his device in 1875, and to have proceeded with due diligence, considering his poverty and ignorance, to the obtaining of a patent in 1878. Plaintiff, however, says that its invention was first made in Germany, in 1872, and in September, 1874, circulars were sent to this country to persons engaged in the brewing trade, and with the view of introducing the Meller & Hoffman process into use here. It is attempted to carry the date of the plaintiff's invention back to the time when these circulars were received, which was undoubtedly anterior to the time when Pfaudler had perfected his mechanism. But it seems to me there are two objections to these circulars:

First. They do not describe the Meller & Hoffman device with that clearness and certainty which the law requires for an anticipation. Thus, in *Seymour v. Osborne*, 11 Wall. 516, 555, it is said that—

"Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those

skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defense, must be an account of a complete and operative invention capable of being put into practical operation."

So, in the case of *Hills v. Evans*, 6 Law T. (N. S.) 90, Lord WESTBURY observes:

"There is not, I think, any other general answer that can be given to the question than this: that the information as to an alleged invention given by the prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The invention must be shown to have been before made known. Whatever, therefore, is essential to the invention must be read out of the prior publication. If specific details are necessary for the practical working and real utility of the alleged invention, they must be found substantially in the prior publication. * * * Upon principle, therefore, I conclude that the prior knowledge of an invention, to avoid a patent, must be knowledge equal to that required to be given by a patent, viz., such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use."

Now, referring to the second circular, which is much the fuller of the two, Meller says that—

"By this device the beer is transferred immediately from the fermenting tank into the casks, and there placed under pressure of carbonic acid. Heretofore, in all breweries where beer has been bunged at all, each cask was separately bunged, and to prevent the bursting of the cask the moment the beer became ripe, it had to be watched very closely. Now, by my process, a series of casks or even all casks in one cellar are connected among themselves, and with a carbonic acid generator. Thus a supply of carbonic acid is introduced into the beer immediately after the casks are bunged, while afterwards any surplus of said acid generated into the casks is let off into the free air. The brewer is thus enabled to regulate the pressure equally in all casks connected with the apparatus to any desired degree."

This is all there is in the circular by way of specification. It is true that annexed to it there is an incomplete drawing which might possibly, to a skilled workman, give an idea as to the real construction of the device, but, tested by the definition found in the two cases above cited, it seems to me to fall considerably short of the particularity required in a patent, or in a publication claimed to anticipate a patent. It is stated by Dr. Frings, the expert, as a reason for omitting to describe them fully, that Meller was afraid that somebody might steal his invention. It has been frequently held that drawings alone, unaccompanied by letter-press description, will never invalidate a patent. *In re Atterbury*, 9 O. G. 640; *Judson v. Cope*, 1 Fisher, 615; *Reeves v. Keystone, etc., Co.* 5 Fisher, 456.

Second. It has been held generally, and perhaps universally, that business circulars which are sent only to persons engaged or supposed to be engaged in the trade, are not such publications as the law contemplates in section 4886. *Pierson v. Colgate*, 24 O. G. 203; *In re Atterbury*, 9 O. G. 640; *Judson v. Cope*, 1 Fisher, 615; *Reeves v. Keystone Co.* 5 Fisher 456; *Seymour v. Osborne*, 11 Wall. 555.

Upon the whole, I have come to the conclusion, I confess with a good deal of hesitation, that Pfaudler is the prior patentee, and that plaintiff's bill must be dismissed.

ONDERDONK *v.* SMITH and others.

(*District Court, S. D. New York. July 26, 1884.*)

1. WHARVES AND SLIPS—OBSTRUCTIONS—SUNKEN PILE—DAMAGE TO VESSEL.

A coal merchant having by arrangement with a railroad company, the owner, obtained the exclusive use of a wharf and of the slip adjoining, for the purpose of receiving coal upon cars of the company, and of thence selling and shipping the coal on board vessels that he procures to come to the wharf to receive it, paying the company a fixed sum, as wharfage, for all coal thus sold and shipped, is liable for the damages to such vessels occasioned by a sunken pile near the wharf, after notice of the existence of the obstruction and of its dangerous character, the vessel having been directed to move over the dangerous spot by his general superintendent.

2. SAME—LIABILITY OF OWNER AND OCCUPANT.

The liability of the company, as owner, for the same damage, if proved, would be no defense to the several liability of the occupant of the wharf.

In Admiralty.

J. A. Hyland, for libelant.

Roger M. Sherman, for respondents.

BROWN, J. The libel in this case was filed to recover damages occasioned by the sinking of a boat called Box No. 8, loaded with coal, at pier 2, Elizabethport, New Jersey, on November 4, 1882. There can be no doubt that the immediate cause of the sinking of the boat was her settling down with the ebb-tide, as she lay along-side the pier, upon a hidden pile, which, as it was subsequently proved, projected about a foot above the bottom of the slip, and was a foot or two outside of the face of the pier. The evidence shows that when the boat was raised, the pile, being thrust through the bottom of the boat, held her pinned fast for a time after she first floated, until she was lifted high enough to clear the pile. The statement of the witness Brown, who superintended the subsequent removal of the pile, that it was about 10 or 12 inches distant from the face of the pier, was but a loose estimate; he said he did not measure the distance, and could not tell exactly. The face of the pier, moreover, was somewhat sloping, so that the use of ordinary fenders would not necessarily have carried the boat's bilge-log on top of the pile, so as to save the bottom from being penetrated. I think there is no question, upon the evidence, that the pile was far enough from the pier to run through the bottom of the boat inside of the bilge-log where the hole was found.

The defendants, by agreement with the Jersey Central Railroad Company, the owners of the pier, had the exclusive use of the pier

for the purpose of receiving coal brought there in cars by the railroad company, and of selling the coal there, and shipping it on board vessels which were in the habit of coming along-side, by the defendants' procurement, to receive it. For this exclusive use of the pier, and of the shipping privileges in the adjacent slip, the defendants paid the company five cents a ton wharfage upon all coal sold. The company were to keep the pier in repair, and, as it would seem, the slip also. The only use of the pier that the company had was in running their cars down upon it for the purpose of making convenient delivery of the coal to the defendants for the purposes of sale and shipment by the latter, as above stated. The defendants had a building there which they occupied exclusively as an office; and they stored coal in bins on the pier. No other person had any right there. The coal that was on the boat when it was sunk had been sold by the defendants to R. H. Williams & Co., to be delivered at said pier free on board; and the last-named firm employed the boat to transport the coal. The whole management of the defendants' business there was intrusted to one Devlan, who directed the boat to its position, and, according to the testimony of the captain, told the latter that the bottom of the slip was good, and that nothing was in the way. This conversation is denied by Devlan.

It is immaterial whether the defendants were, in strictness, lessees of the pier or not. So far as the use of the pier and of the adjoining slip for the purpose of shipping coal from this wharf was concerned, they were in exclusive possession and control. It is this possession and control which are the material things, under whatever arrangement acquired. To this possession and control the law attaches a legal obligation to answer for all obstructions that are known, or might by reasonable diligence have become known, that cause damage to vessels resorting thither in the regular course of the business carried on there by those having the use of the wharf and slip. To this liability it is not essential that the defendant be in sole possession; nor is it material whether, as between the occupant and the owner, the former or the latter is bound to repair. Both may be liable, severally, for the damages, as for a tort; and the liability of the occupant follows from the fact of his possession and use, and from the duty which the law casts upon him to give notice and warning against such obstructions to persons whom he invites there, so long as the obstructions remain, provided he himself has knowledge or notice of them. *The John A. Berkman*, 6 FED. REP. 535; *Christian v. Van Tassel*, 12 FED. REP. 884; *Swords v. Edgar*, 59 N. Y. 35; *Leary v. Woodruff*, 4 Hun, 99; *Cannavan v. Conkling*, 1 Daly, 509; *Carleton v. Franconia, etc., Co.* 99 Mass. 216.

The evidence satisfies me that Mr. Devlan had ample notice some three weeks previous to this accident of the existence of the obstruction, and of its dangerous character. At that time another boat grounded in the same place, and sustained some injury, on notice

of which he referred its owner to the company for compensation. This notice and this knowledge bound Devlan to make a thorough examination, and to warn away all other boats from the place of the accident, or, at least, not to invite or direct them there until the obstruction was removed. This duty pertained to him as superintendent of the defendants' business. The evidence shows that the examination made by Devlan was inefficient, and apparently of a perfunctory character, with no real desire to find the obstruction. Had he wished to find it, nothing would have been easier than to call to his aid his employe, who knew just where it was, instead of saying that he would discharge the man if he knew who he was. After the previous boat had caught, and full notice of this had been given to Devlan, it is but just that any subsequent damage should be made good by him and his principals, rather than by innocent persons who moved their boats to the same place by his directions without any notice of danger. The defendants were fully represented by Devlan, and are bound by his neglect. The libellant is therefore entitled to judgment. A reference may be taken to compute the damages, and, at the same time, any further evidence desired by either party may be given as to the exact place, nature, and extent of the injury, and of the previous condition of the boat.

BROUTY v. FIVE THOUSAND TWO HUNDRED AND FIFTY-SIX BUNDLES OF ELM STAVES, etc.

(District Court, N. D. New York. 1884.)

1. CARRIER OF GOODS—BILL OF LADING—QUANTITY OF GOODS SHIPPED.

A bill of lading is not conclusive upon a carrier of goods as to the quantity received for carriage, but, like other receipts, may be explained.

2. SAME—EVIDENCE OF LOSS OF GOODS—ACTION TO RECOVER FREIGHT—OFFSET.

Upon examination of the evidence in this case, *held*, that it does not show conclusively that the alleged loss of a portion of the cargo occurred while the same was on the schooner, and that damages for such loss could not, in the absence of proof that the carrier was at fault, be allowed as an offset in an action to recover the freight.

In Admiralty.

Cook & Fitzgerald, for libellant.

Marshall, Clinton & Wilson, for claimant.

COXE, J. This is an action for freight. The defense is non-delivery of a part of the cargo. On the tenth of May, 1884, the libellant, who is the owner and master of the schooner *Seabird*, for and in consideration of the sum of \$121.65, agreed to convey from New Baltimore, Michigan, to Buffalo, New York, certain property described in the bill of lading as "5,256 bundles of staves and 259 barrels of heading." As no tally was made at New Baltimore, the only evidence at

that time of the number placed on board is furnished by the bill of lading. On or about the sixteenth of May the *Seabird* arrived at the port of Buffalo. The consignee was duly notified and the cargo immediately discharged. The greater portion thereof was, the same day, placed in freight cars by stevedores employed by the claimant. Two and a half car-loads, however, remained on the dock all night. When the cars were loaded they were sealed, and were soon afterwards, by order of the claimant, conveyed to his manufactory, five or six miles from the dock, where they remained on a siding till June 28th. On that day a tally was commenced, which was not completed till July 5th. It was then that the deficiency of 631 bundles of staves and 5 barrels of heading was discovered. So far as is disclosed by the evidence, no other authentic tally was made at any time. The claimant refused to pay the freight until the libelant furnished him a statement showing that the full number called for by the bill of lading had been delivered. He now seeks to offset against the freight the value of the missing property. There is no theory upon which he should be permitted to do this. The libelant did all that he was bound to do. There is not a particle of evidence that any of the cargo was lost, stolen, or destroyed while in his possession. It was not of a character to excite the cupidity of seamen. It could not be secreted or easily carried away, and it is absurd to suppose that it was wantonly destroyed. No motive, or opportunity even, for fraud has been shown; no negligence has been proved. Indeed, nothing has been found in the testimony which would justify the court in the shadow of a suspicion against the libelant or any of his crew. Every witness who speaks upon the subject swears that all of the cargo put on board the *Seabird* at New Baltimore was delivered at Buffalo. This fact must be regarded as conclusively established.

It is argued for the claimant that the libelant is concluded by the allegations of his libel and the statement in the bill of lading signed by him. That having receipted for 5,256 bundles and 259 barrels, he will not now be permitted to say that a less number was placed on his vessel. Assuming this position to be well founded, there is not, as before stated, sufficient to charge the loss upon the libelant. The tally, showing the alleged deficiency, was not made until after the property had remained six weeks in freight cars on a side track in a populous city. The libelant may, with reason, retort that if presumptions and suspicions are to be indulged in, it is quite as reasonable to suppose that the loss occurred during the six weeks that the property was on land as during the one week it was on the water. Had the claimant brought an action for damages founded upon such proof, it would have been the duty of the court to dismiss it. The evidence is too speculative and conjectural. But the bill of lading is not conclusive upon the libelant; like other receipts it may be explained. *Abbe v. Eaton*, 51 N. Y. 410. It would be an intolerable doctrine

to hold the carrier irrevocably bound by every statement signed by him in the bustle and excitement of commerce. He should always be permitted to show the truth. Whether the mistake or loss occurred at New Baltimore or Buffalo is not material so long as no fault can be imputed to the libellant.

There should be a decree for the libellant, with costs.

THE COLORADO.

(*District Court, N. D. New York. 1884.*)

ADMIRALTY PRACTICE—MARSHAL'S FEES—COMMISSIONS.

Where a marshal has been paid his fees and commissions on the sale of a vessel under decree of the district court, and a claimant files a petition, on which monition is issued, asking that the balance of the proceeds of the sale in the registry of the court be paid to him, and it so ordered, the marshal is not entitled, in addition to his fees for serving the process, to a commission on the amount paid to the claimant.

Appeal from Taxation of Marshal's Costs.

James A. Murray, for marshal.

William B. Hoyt, for respondent.

COXE, J. In May, 1884, the propeller Colorado was sold by the marshal, under a decree, and the proceeds were paid into court. His fees and commissions for this service, estimated on the entire amount realized, were paid him in full. After discharging the debt of the libellants there still remained a large sum in the registry of the court.

On the seventh of June, 1884, the present proceeding was instituted by Frederick L. Danforth, as receiver, to reach the amount so remaining. A petition was filed and a monition issued which was placed in the hands of the marshal for service.

In addition to his fees for serving mesne process, mileage, etc., he charged \$49.58 "per cent. on amount recovered." This item was disallowed by the clerk. The marshal now appeals. The clerk was clearly correct. The marshal had already received his commissions. The money was in the registry of the court and under its control. No action on the part of the marshal was necessary to restore it to its rightful owner. When its owner was found the clerk was directed to pay it over. That was all. No process was required and none was issued, there was no sale and no settlement. There is no section of the fee-bill which directly or indirectly makes such a charge permissible, and it is not a case where the discretionary power of the court on the subject of costs can be invoked.

Taxation affirmed.

MAYOR, etc., v. INDEPENDENT STEAM-BOAT Co. and others.

(Circuit Court, S. D. New York. October 1, 1884.)

1. REMOVAL OF CAUSE—SEPARABLE CONTROVERSY—CITIZENSHIP

The mayor and city council of New York filed a bill in the state court against the Independent Steam-boat Company, a New Jersey corporation, another New Jersey corporation, a New York corporation, and a citizen of New York, alleging a combination to establish and operate a ferry in violation of the rights of the city, and that defendants were operating such ferry, and asked for an injunction and accounting. The Independent Steam-boat Company removed the case from the state court. *Held*, that the second subdivision of section 639 of the United States Revised Statutes, having been repealed by the act of March 3, 1875, the only authority for a removal by one of several parties defendant is that provision of the act of March 3, 1875, which permits it when the controversy is wholly between citizens of different states, and can be fully determined as to them; that this was not such a case, and was not removable.

2. SAME—FEDERAL QUESTION—PETITION BY ONE CO-DEFENDANT.

Where there is no separable controversy, as between the plaintiff and removing defendant, and the petition alleges, among other things, that the controversy arises under the constitution and laws of the United States, the suit can only be removed on the petition of all of the defendants, under the first clause of the second section of the act of March 3, 1875.

Motion to Remand.

E. Henry Lacombe, for the motion.

Work & McNamee and *Roscoe Conkling*, opposed.

WALLACE, J. This suit was removed from the state court upon the petition of one of the defendants, the Independent Steam-boat Company, a New Jersey corporation. The bill of complaint alleges a combination between that corporation, another New Jersey corporation, a New York corporation, and one Starin, a citizen of New York, to establish and operate a ferry in violation of the rights of the plaintiff, and that defendants are now operating such ferry. The prayer for relief is for an injunction and an accounting.

Under the second subdivision of section 639 of the United States Revised Statutes such a suit might have been removed upon the petition of a single defendant, between whom and the plaintiff the requisite diversity of citizenship existed. But, as is held in *Hyde v. Ruble*, 104 U. S. 407, and *King v. Cornell*, 106 U. S. 395, S. C. 1 Sup. Ct. Rep. 312, that subdivision of the section was repealed by the act of March 3, 1875. The only authority, therefore, for a removal by one of several parties defendant is that provision of the act of March 3, 1875, which permits it when the controversy is wholly between citizens of different states, and can be fully determined as between them. The controversy here is not of such a character. It is not a separable controversy within the decisions of this court. *Boyd v. Gill*, 19 FED. REP. 145.

The petition alleges, among other things, that the controversy arises under the constitution and laws of the United States. If this is so, the suit can only be removed on the petition of all of the defendants,

unless there is also a separable controversy as between the plaintiff and the removing defendant. All the substantial parties upon one side of the controversy must unite in order to remove the suit under the first clause of the second section of the act of March 3, 1875. *Meyer v. Construction Co.* 100 U. S. 457. Unless all desire and join in the removal it cannot be effected. Here the defendant Starin and the New York corporation are as substantial parties defendant as is the New Jersey corporation.

The motion to remand is granted.

COLTON v. COLTON.

(Circuit Court, D. California. September 22, 1884.)

WILL—PRECATORY TRUST.

C., by will, left all of his property to his wife, with full power of disposition, adding these words: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as, in her judgment, will be best. I also request my dear wife to make such provision for my daughters, H. and C., as she may, in her love for them, choose to exercise." *Held*, that no precatory trust was created by the use of the words of recommendation and request.

In Equity.

W. W. & H. S. Foote and Grove L. Johnson, for complainant.

Crittenden Thornton and Stanly, Stoney & Hayes, for defendant.

SAWYER, J. This is a bill in equity to establish a trust in favor of complainant in the estate of the late David D. Colton, deceased, in the hands of his devisee and legatee, Ellen M. Colton, and to obtain a decree against the defendant requiring her to make a suitable provision out of the estate devised and bequeathed to defendant for the maintenance of complainant. The will out of which the suit arises is as follows, to-wit:

"I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property, and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as, in her judgment, will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may, in her love for them, choose to exercise. I hereby appoint my said wife to be the executrix of this, my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court or of any court, and upon such terms and in such manner, with or

without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my friend S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship, and authorize her to call in either or both of the said gentlemen to be her co-executors. And, in case she shall so unite either or both of them with her, the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers."

The question is, does this will create a trust in favor of complainant? Do the recommendations and requests found in the will give an absolute legacy to the complainant out of the estate, and do they constitute an imperative command to make the provision, or is the matter left to the discretion of the surviving wife, as sole devisee and legatee, to act in the matter as her judgment and feelings shall dictate? It cannot be denied that the earlier English decisions and a few of the earlier cases in this country go a long way towards sustaining the claim set up by the complainant. But later cases, both in England and the United States, considerably limit the construction given by the earlier decisions to precatory words of a will, or words of request or recommendation, and some of them, especially in this country, fall little short of repudiating and altogether overruling the earlier cases. Says Story, on this subject:

"In the interpretation of the language of wills, also, courts of equity have gone great lengths by creating implied or constructive trusts from mere recommendatory and precatory words of the testator." 2 Story, Eq. Jur. § 1068.

After considering the English cases he adds:

"The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that, in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good-will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation, and other words precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense." 2 Story, Eq. § 1070.

The most favorable rule for complainant now recognized, that can be deduced from the body of the English authorities, is, doubtless, that stated by Lord LANGDALE in *Knight v. Knight*, 3 Beav. 173, where he said:

"As a general rule it has been laid down that where property has been given absolutely to any person, and the same person is, by the giver who has power to command, been recommended or entreated or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish should be held to create a trust: (1) If the words are so used that, upon the whole, they ought to be construed as imperative; (2) if the subject of the recommendation or wish be certain; and (3) if the objects, or persons intended to have the benefit of the recommendation or wish, be also certain." See 44 Amer. Dec. 372, note to *Harrisons v. Harrisons' Adm'x*, 2 Grat. 1.

On the contrary, in the language of Story: "Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite; wherever the *property to which it is to attach is not certain or definite*; wherever a clear discretion or choice to act or not to act is given; *wherever the prior dispositions of the property import absolute and uncontrollable ownership*,—in all such cases courts of equity will not create a trust from words of this character." 2 Story, Eq. Jur. § 1070. See, also, *Howard v. Carusi*, 109 U. S. 733, 734; S. C. 3 Sup. Ct. Rep. 575; citing and recognizing the rule as stated by Story, and 2 Pom. Eq. Jur. §§ 1014–1017, where the subject is well discussed.

Upon a careful consideration of the language of the will—giving the words their usual natural signification, as they would, doubtless, be understood almost, if not quite, universally by ordinarily intelligent English-speaking people, without reference to any strained, artificial, or technical rules of construction—it appears to me that two, at least, if not three of these requisite conditions, negatively stated, are found in the will. The "objects of the supposed recommendatory trusts" are, undoubtedly, "certain and definite,"—they are the mother and sister of the testator. But "the property to which it [the trust] is to attach is not certain or definite." "The *subject of the recommendation or wish*" is, surely, not "certain." No specific property or amount is indicated as the subject of the asserted legacy or trust. The testator only "requests" his general legatee and devisee "to make *such gift and provision for them as in her judgment will be best*," apparently leaving the whole matter to her judgment and discretion. How is the court to determine to what property, or to what amount of money, the trust is to attach? Neither the property nor the amount of money is indicated; and the testator has not left the matter to the judgment of the court to determine, but in express terms to the judgment of his surviving wife, his sole devisee and legatee. The subject is, therefore, not certain or definite. The testator has neither indicated the particular property, nor the particular amount of money, out of the million of dollars in value claimed to have been left, to which the legacy or trust is to attach, nor has he indicated any rule by which the property or amount can be ascertained, other than the judgment of his surviving wife, which judgment she appears to have exercised, for she made gifts from time to time, in small sums, amounting in the aggregate to \$1,500. Certainly, the property

or amount of money to which the trust, if any there be, is to attach,—the subject of the recommendation or request, or the subject of the trust,—could not well be more uncertain or more indefinite. In the absence of words expressly creating a trust, this indefiniteness and uncertainty constitute strong evidence that the testator did not intend to create a trust. In language quoted from *Morice v. Bishop of Durham*, 10 Ves. 536: “And wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are not to be found in the will, not *expressly* creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended;” or, as Lord Eldon expresses it in another case, (*Wright v. Atkyns*, Turn. & R. 159:) “Where a trust is to be raised, characterized by uncertainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say it is not sufficiently clear what the testator intended.” See, also, *Knight v. Boughton*, 11 Clark & F. 548;” note to section 1070, Story, Eq. Jur. 284, 285. In the notes to *Harrisons v. Harrisons’ Adm’x*, 2 Grat. 1, reported in 44 Amer. Dec. 375, and in 2 Story, Eq. Jur. § 1073 *et seq.*, notes, the cases are cited illustrating certainty and uncertainty in a will, within the meaning of the condition of the rule adopted by the courts, as to the subject of the recommendation or request; and, as it appears to me, few of those provisions, held to be too uncertain to create a trust, are more uncertain or indefinite than the provision in the will in question. And, in the language of Lord COTTENHAM in *Finden v. Stephens*, 2 Phil. 142: “Words of recommendation are never construed as trusts unless the subject be certain.” 44 Amer. Dec. 376. The will in question, therefore, fails in this condition of certainty as to the subject, essential to the creation of a trust by precatory words, even under the English rule most favorable to such trusts now recognized.

Again, under that branch of the rule stated by Story, that wherever “the prior dispositions of the property import absolute, uncontrollable ownership, courts of equity will not create a trust from words of this character.” 2 Story, Eq. Jur. § 1070. This will is deficient in this one of the elements from which the intention to create a trust may be inferred. No language can more clearly and unmistakably “dispose of property” absolutely, or “import absolute, uncontrollable ownership” in the devisee or legatee, than the language of this will, making “the prior disposition of the property of the testator,” which is: “I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed, or entitled to.” And further on in his will the testator adds: “I authorize and empower her to sell, dispose of, and convey

any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms and in such manner, with or without notice, as to her shall seem best." If this language of gift and devise, and this power to dispose of and control, does not constitute "a prior disposition of the property," which "imports absolute and uncontrollable ownership," then I am at a loss to know what would express that idea or effect such a purpose. In this respect, also, the will is deficient in one of the elements suggested by Story as necessary to create a trust from mere precatory words, or words of recommendation, or expressing a desire.

Again, are the words, considered by themselves, "so used as, upon the whole, they ought to be construed as imperative," or is there "a clear discretion or choice to act or not to act" given, irrespective of other elements to be considered. The language, and all the language, to be considered on this point, is, "*I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best;*" or, in effect, I do not myself make any gift or any provision for them, according to my judgment, or determine how much they ought to have, but I recommend them "to her care and protection;" and I "request her to make such gift and provision for them as in her judgment will be best."

By the express terms of the Civil Code of California, "a will is to be construed according to the intention of the testator," and the "testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it is made, exclusive of his oral declarations." "All parts of the will are to be construed in relation to each other, and so, as if possible, to form a consistent whole." "*A clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct, or by inference or argument * * * from other parts of the will.*" "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Civil Code, §§ 1317, 1318, 1321, 1322, 1324. It seems to me that, under these rules, it is impossible to hold it to have been the intention of the testator himself to give absolutely any portion of his estate, to be held in trust for complainant. The language is plain and readily understood, taking the words in their ordinary and grammatical sense. The testator manifestly appreciated the difference, which every one must recognize, between words of absolute devise or bequest, and mere words of recommendation or request. To construe these latter words of recommendation and request as meaning precisely the same thing as words of absolute bequest, would be to give them a meaning entirely different from the sense in which they are ordinarily used and ordinarily understood. The "clear and distinct" prior absolute

"devise and bequest" to the defendant of all his estate, in language which it is impossible to misunderstand, would be materially "affected" by converting an indefinite and unascertainable part of the absolute estate given to defendant into a trust, by "*words not equally clear and distinct*," by "inference or argument from other parts of the will," contrary to the rule expressly laid down by the Code. Had the testator intended to give any part of his estate absolutely in trust for the complainant, he would certainly have so stated, and would have declared what part, or how much money, he intended to set apart for her. He would have made the extent of his bequest "clear and distinct,"—as clear and distinct as the devise to the defendant,—and not left it to the sole judgment of the defendant to determine the amount or character or value of the bequest, or the extent of his bounty.

The language of the will cited seems to be plain and intelligible. It is not the language of gift or devise, or the language of command. It is clearly language of recommendation and request, leaving the matter to the discretion and judgment of his surviving wife to carry out his suggestion or not, or to such extent as seems to her best, according to the dictates of her own discretion and judgment. Such is the plain import of the words, as they would ordinarily be understood when taken by themselves, and considered by the great mass of English-speaking people, without reference to strained, artificial, or technical rules of construction. They are, as it seems to me, so plain to the common mind as not to need interpretation. But when we come to call in other elements recognized by the rules of construction heretofore adopted by the courts for the purpose of aiding in converting the recommendation and request into a command or gift, we still find that all these elements except one—the certainty as to the objects—are wanting. The testator manifestly understood the force of language. He knew well what language to use to express his intention to make a devise or bequest. There is no uncertain sound in "I give and bequeath to my wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed." If he had intended to make a gift, bequest, or devise to his mother and sister; he certainly knew in what language to express that intent, and he would have said so, and how much. He has expressed, in specific language, no intention to give to them directly, or to any one in trust for them, any portion of his estate; or, if any portion, what particular portion, or how much. He has simply used words of recommendation and request to his sole devisee and legatee, and left the whole matter, in express terms, to her judgment. This is the plain, natural meaning of his language, when taken by itself, or when considered in connection with all the other language of the will. When we consider the concise, clear, and specific language of this brief will, in all its other parts, it seems impossible that the testator should have used words of mere recommendation

and request to his wife, committing the whole matter, as to the gifts and provisions for them, in express terms, to her judgment; that he should have requested her to make the gift, when he intended to make a gift, legacy, or devise to them himself,—when he intended to command.

It is urged, on the part of the claimant, that in this class of cases a wish expressed or a simple request to the devoted and obedient wife is equivalent to a command. This, when voluntarily recognized as an obligation by the wife in the affairs of married life, may be a very proper and salutary principle and practice in marital polity and domestic etiquette; but it is too romantic, too largely deficient in the sanctions of the obligations of positive law, too loose and uncertain, to be adopted by the courts as a rule of law by which large estates are to be distributed, in opposition to the plain, ordinary, actual, matter-of-fact sense of the words of a will. As to myself, I fully concur with Vice-chancellor HART in his observations in *Sale v. Moore*, 1 Sim. 540, "that the first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them." He further adds that "the current of authorities of late years has been against converting the legatee into a trustee." See 44 Amer. Dec. 378, note. In my judgment, to hold that the precatory words and words of recommendation found in the will of the late Gen. Colton creates an indefinite trust in an unascertained and uncertain *quantum* of the estate of the deceased in the hands of Mrs. Colton, for the benefit of the mother and sister of the testator, would be to make a will for the deceased, and not to execute the will made by him.

An argument is sought to be derived, in favor of a construction creating a trust, from the last two clauses in the will, relating to co-executors. In case the executrix should desire assistance in the execution of the will, the testator provisionally appoints two other gentlemen as executors, and authorizes the executrix to associate either one or both as co-executor or co-executors, "and in case she shall so unite either or both with her, the same provisions are hereby made applicable to them as I have before made for her *in reference to bonds and duties and powers*." It is argued that under this provision the recommendation and request as to care and provision for the testator's mother and sister would impose the same trust on them as is imposed upon Mrs. Colton, and that, certainly, as to them the request is equivalent to a command, and being so as to them, they must have the same construction with respect to Mrs. Colton. But the character of Mrs. Colton as executrix, and as devisee and legatee, are wholly different and distinct. These words of recommendation and request were addressed to her as the wife of the testator, and his devisee and legatee, and not as the executrix of his will,—as owner and not administratrix of his estate. She has performed all her trusts as executrix; the estate has been settled and distributed to her as

devisee and legatee, and she has been discharged from her trust as executrix. So it appears from the bill.

This suit is brought against her to enforce a trust vested in her as legatee, for the benefit of complainant, and not against her in her representative character of executrix. So, the closing passage of the will, making the same provision applicable to her co-executor or co-executors in the contingency provided for, "as I have before made for her in reference to bonds and duties and powers," has sole reference to the bonds waived, and to the "duties and powers" conferred on her as executrix. It confers no rights or powers or duties upon these co-executors in the character of devisees or legatees; and no argument can be derived from this passage to support the creation by the court of a trust.

Upon the views thus taken upon the construction of the will it is unnecessary to notice the other points argued under the demurrer. The demurrer is sustained, and, as the whole case depends upon the construction of the will, no amendment can be made to the bill that will obviate the objection taken by the demurrer. The bill must therefore be dismissed; and it is so ordered.

COLTON v. COLTON.

(Circuit Court, D. California. September 22, 1884.)

WILL—PRECATORY TRUST.

Colton v. Colton, ante, 594, followed, demurrer sustained, and bill dismissed.

W. W. & H. S. Foote and Grove L. Johnson, for complainant.

Crittenden Thornton and Stanly, Stoney & Hayes, for defendant.

SAWYER, J. This is a bill in equity seeking a decree declaring and enforcing a trust in favor of the sister of the late David D. Colton, deceased, claimed to arise out of the same clause of the will considered in the preceding case of *Colton v. Colton*, ante, 594. The same construction must, of course, be given to the clause in this case as was adopted in the other. For reasons in that case stated, the demurrer to the bill must be sustained and the bill dismissed; and it is so ordered.

FINK and others v. PATTERSON and others.

(Circuit Court, E. D. Virginia. July, 1884.)

EQUITABLE JURISDICTION AND RELIEF—INSOLVENT PARTNERSHIP—RECEIVER.

An insolvent firm offers by circular letter to its creditors to pay 50 per cent. of their debts, and agrees in the same circular to make no preferences. Many creditors accept the offer. It subsequently continues business at large expense, postpones the execution of this compromise for an indefinite period until all the creditors accept, and pays many of the debts in full, thereby making preferences. *Held*, equity has jurisdiction on bill filed to appoint a receiver and take possession of the firm assets and administer them for the benefit of the creditors; and this can be done in Virginia by a creditors' bill, without previously obtaining judgments at law.

In Equity. The facts are stated in the opinion.

Coke & Pickrell, for plaintiffs.

Friend & Davis, for defendants.

HUGHES, J. The principal facts of this case, as shown by the papers and proofs now before the court, are as follows:

The defendants are grocers in Petersburg. They have been carrying on their business since 1878. They put no capital in it. They began with a stock of goods worth about \$4,000, and owed for it about \$6,000. Their business has not been profitable. They have made nothing but their personal expenses. By the first of June, 1884, they became insolvent, and their business paper went to protest. Thereupon they consulted legal counsel as to the course best to be pursued. These advised an assignment in liquidation. They did not adopt this advice. They took counsel of mercantile friends in Petersburg, expressing a wish to go on with their business as the best method of liquidating their affairs. They determined to go on with it for this purpose. They accordingly drew up a scheme for compounding with their creditors, framed on the basis of paying 50 per cent. This was approved and accepted by most of their Petersburg creditors. They then proposed this scheme to their creditors in general, embodying it in a circular letter, which was mailed to the non-residents. The circular was as follows:

"PETERSBURGH, 18th June, 1884.

"To _____.

"DEAR SIR:

"We owe, by bills payable and open accounts, - - \$26,552 19

"Our assets are stock in hand, bills receivable, and open accounts that we consider good, - - 14,156 81

"We offer to our creditors fifty cents in the dollar, to be paid as follows: Twenty cents in the dollar, first November, 1884; twenty cents in the dollar on the first March, 1885; and ten cents in the dollar in cash as soon as our banks begin to discount paper, which we believe will be in a very few days. The deferred payments to carry interest at the rate of six per cent. per annum. We make no preferences, but make the same proposition to all. Please let us hear from you at as early a date as practicable.

"Yours, truly,

PATTERSON, MADISON & Co."

Meanwhile, and until the eighth of July, their business went on as before, except that they discharged two clerks, and made purchases of only such goods as were necessary to fill orders, buying both for cash and on credit. They continued to collect and sell, and they paid some of their debts in full.

More than a majority of their non-resident creditors answered accepting their proposition of compromise; a few of them accepting absolutely, but most of them in a form more or less qualified and conditional. The complainants and one or two other creditors refused to accept. In the course of a short time their proposition for compromise, after its acceptance as aforesaid, assumed features not contained and expressed in the circular of June the 18th. Those features were—*First*, that in order to its being obligatory on the defendants all creditors must accept it; *second*, that the creditors accepting must release that portion of their claims not provided to be paid; *third*, that the proposition would be kept open, if necessary, until October, 1884; and, *fourth*, some of their creditors had been and others would be paid in full.

The books of the concern show that the condition of the business is worse than is represented by the circular letter. I infer that the assets will not realize \$10,000. It seems, too, as already indicated, that after the proposition of compromise was made, and after its acceptance by many of the creditors was given, the defendants paid off a portion, more or less considerable, of their obligations in full in cash. The statement of their answer on this subject is as follows: "We reserved from the assets a sum sufficient to pay certain confidential debts of the firm which stood upon the highest ground of personal honor and obligation; most, if not all, of which have since matured and been paid out of the fund so reserved and set aside." There is no statement or indication in the answer of what the amount of the fund was which they so reserved and used, or of the amount of these obligations of honor. These must be gathered from the books. The answer further recites that one of defendants' counsel said to one of the complainants in this cause, before the suit was brought, in answer to an inquiry as to what security the creditors who accepted the compromise would have for the payment of the 50 per cent. promised, that if the compromise was made with any of the creditors, and any other creditor should institute proceedings to obstruct the settlement and prevent the payment, he would advise the firm to prefer the parties who accepted for the amount due by the compromise. This conversation was not known to defendants until after the filing of the bill in this cause; and the counsel who made the statement did not know at the time that in their offer of compromise defendants required that all creditors should accept. One of the creditors of the firm, John Pickrell, avers as follows in an affidavit filed: In a conversation he had with Patterson and Madison on the first of July, chiefly with the former, "they positively refused to make an assignment. The affiant assured them that there could be no doubt but that all their creditors would accept it, and release the balance of their claims, and that all that was wanted was a devotion of their assets to the payment of their liabilities. This they refused to do positively. Affiant then pressed them to name some time within which their offer of compromise (which was expressly not to be binding until all their creditors signed) should be accepted or rejected. This, also, they refused to do, stating that none of their creditors could obtain judgment against them until October, and that they would do nothing until that time; and that they would, unless all the creditors should come in before, hold the negotiations open until October. The impression left on the mind of affiant from this conversation is strong that if any of their creditors should eventually force them by suit to make an assignment, such creditor would be left out or postponed to the other creditors."

In a letter to F. E. Patrick, one of their accepting creditors, defendants wrote on the third of July, 1884:

"Your letter accepting our offer of compromise was duly received, and we did not reply, hoping to hear promptly from all of the creditors, when we would at once be able to comply with our proposition. We have the acceptance of the majority, both in number and amount of money due, and think some are waiting for the maturity of our paper that they hold, before writ-

ing. We think in the course of two to three weeks, at furthest, we will have the compliance of all.

"Those of our creditors who have signified their agreement to our proposition may be assured that their interest shall not suffer in any event. Judgment cannot be had against us till late in October, and by that time, by our plan, all will receive thirty per cent. of their debt; and to make an assignment now we do not believe they, the creditors, would ever get that much."

The business went on till the eighth instant, when the marshal of this court, under an order issued on the evening before, took possession of the goods in trade, premises, books and papers of the defendants. The order contained a rule upon the defendants to show cause on the tenth instant why a receiver should not be appointed, and why the usual preliminary injunction against interference with the effects of the firm should not be granted.

I am now to pass upon the motion for an injunction and a receiver.

The case is, in its facts, a novel and peculiar one. I do not know any case like it in the reports. Most of the creditors who have accepted the proposition of compromise have but small amounts involved. The proofs seem to show that the complainants in this suit are the largest of the creditors. Their claim is for \$2,167; and the debt is acknowledged to be due by the defendants in their answer. This indebtedness was incurred within 90 days before the suspension, and the books show that as much as \$20,000 was received by defendants in a short period before and after their failure.

The bill complains that the defendants refuse to make assignment of their effects for the payment of their creditors; that the firm have no credit, and are still going on with a feeble and crippled business, consuming by expenses the fund out of which creditors must be paid; that defendants announce their purpose thus to continue their business until October, if necessary; and that the only redress of creditors against this waste of the fund on which they must exclusively rely for payment, is in a court of equity, by means of the appointment of a receiver and an injunction. They bring their bill, therefore, and pray that through the instrumentality of a receiver the effects of the defendants may be sold, the debts due them collected, and that the fund so arising may be applied *pro rata* to the payment of all creditors.

From and after the acceptance by any creditors of the proposition for compromise made by the defendants on the eighteenth of June, 1884, all the assets of the firm, including property and choses in action, became a trust fund expressly dedicated to the payment, without preferences, of the 50 per cent. of debts promised by the circular letter. Offering no indorsements, tendering no security, insolvent themselves, their proposition could be nothing else than a dedication of their assets to the fulfillment of the terms of the composition. By accepting, the creditors contracted to receive 50 per cent. in full discharge of their claims. What was the consideration given by the defendants for this agreement but the devotion of their assets to the payment of the 50 per cent.?

It is well-established law that partnership assets are, in the eye of

equity, a trust fund for the payment of partnership debts. Being a trust fund, creditors have a right, by proceedings in equity, to subject it to the purposes of the trust. There is a good deal of learning in the books to the effect that creditors at large have not a direct lien upon this fund; but that their lien must be "worked out" through the equity of the individual partners, and availed of by derivative process. However this may be in ordinary cases, the present case is one in which this implied character of a trust fund is made positive by an express dedication of their assets, by the partnership firm, in their proposition for compromise, to the payment of creditors *pro rata*. It is true that this dedication is open to impeachment on grounds about to be stated; but it is nevertheless true that, as to the defendants themselves, it is valid and binding, and they are estopped from objecting to the defects of the dedication.

The law is well settled that an insolvent partnership may convey its whole property for the payment of its debts, giving preferences among creditors if they choose; and, moreover, if the partners convey all their property for this purpose, they have a right to insert a clause requiring a release from the creditors of the portion of their claims not paid. Such a clause will not vitiate the assignment. *Gordon v. Cannon*, 18 Grat. 387. In the absence of a bankruptcy law, such a deed is just as unassailable in a federal as in a state court, and would be unimpeachable in this court. The defendants in this case, however, did not make such an assignment. Nor did they do the next best thing to making an assignment; namely, they did not go on with their business, avoiding complications of every sort. Discarding professional advice, they took counsel from the street; and of their own heads, and without the aid of legal counsel, they drew up a proposal for a compromise, without preferences, and presented it to their creditors, a majority of whom, conciliated by the stipulation that it should be without any preferences, promptly accepted its terms; many of them presuming, no doubt, that a deed of assignment would be made, carrying its provisions into effect. But it afterwards transpired that the defendants would not hold themselves bound by their proposal, unless, before some unnamed date, all the creditors should accept; and unless, in accepting, the creditors should release the portion of their claims not provided for in the proposition. Creditors were also, in course of time, informed that negotiations would be held open if necessary until October, 1884. It is now stated that preferences have been given. Creditors have also discovered that, until all have signed the composition, defendants are going on and intend to go on with their business, receiving moneys, selling off stock in trade, incurring new debts, and paying out cash at their own discretion, fearless of the courts, until October.

The question is whether this is a course of proceeding that a court of equity must needs sanction. If defendants had made a deed conveying to a trustee their stock of goods for the benefit of creditors,

and had inserted in the deed a provision that they should remain in possession and continue the business as it was carried on before the deed, until default should be made in paying any of the debts secured, the law of the land declares that such a deed would have been fraudulent and void. *Addington v. Etheridge*, 12 Grat. 436. Yet these defendants, after dedicating their property to the payment of their debts, went on to do, without making a deed, precisely what, if they had made one, would have been pronounced fraudulent.

Again, a debtor may require of creditors a release from that part of their claims not provided for in a deed of assignment, if he conveys in the deed all his property; and if in the deed he gives the creditors all the information in regard to his condition which they ought to have in order to determine whether or not to accept the terms of the deed and to release what it does not provide for. Unless a deed requiring such a release does do this, the law pronounces it invalid and void. *Gordon v. Cannon*, 18 Grat. 388. The defendants did not make a deed; but, while giving out by their circular letter that they were dedicating all their assets to the purposes of the compromise, they now themselves say in their answer that they withheld a considerable amount of money in cash, and paid off various debts of honor in full. Instead of imparting this information in their circular of June 18th to their creditors, they withheld it from them, stating that they gave no preferences. Here again they did, without executing a deed, what, if they had done it in executing one, would have rendered the deed fraudulent and void. The statement of their condition in the circular letter, instead of imparting true information to the creditors, not only suppressed the fact just alluded to, but was otherwise exceedingly deceptive. Most probably this latter deception was not intentional. Debtors usually victimize themselves more than their creditors in their estimates of their own pecuniary condition. The real fact was that the defendants were too far gone in irretrievable insolvency to have honestly continued their business. Every sale they have since made, every dollar they have since paid out, has been more or less prejudicial to the interests, and has been positively violative of the rights of their creditors. When goods in trade are once dedicated to the payment of creditors; when the character of a positive and express trust is once imparted to assets by the debtor's act, whether by deed or otherwise,—then any dealing thereafter with them by the debtor is improper in itself, and fraudulent in the eye of the law.

Here was the case of a firm hopelessly insolvent,—insolvent beyond their own belief, and beyond the representations they made to creditors in proposing a composition. Here was the case of a firm making a proposition of compromise without preferences, which implied and from which the law presumed that they were offering to dedicate all their effects to its fulfillment, yet withholding large cash means, and paying off in full with this cash a portion of their credit-

ors, after most of the others had accepted their proposition which promised no preferences, and while it was pending for the acceptance of the rest. Here was the case of a firm which, after dedicating and being presumed by law to have dedicated all their effects as a trust fund to the payment of all their debts *pro rata*, yet going on with the business as if the property was still their own, paying off debts in full, and subjecting an exceedingly perishable trust fund to the hazards and losses of a business which had brought them, while in good credit, to hopeless bankruptcy.

On the case thus presented to the court the crucial question is whether equity has any remedy for such a state of things. The complainants in this cause are the largest creditors of the defendants. The proposition of June 18, 1884, is still open to their acceptance. They would be willing to accept if any security were offered that the promise to pay 50 per cent. would be fulfilled. In the absence of such security they would still be willing to accept, if by deed of assignment the assets of the defendants were set apart out of the control of defendants and appropriated to the payment of the claims of creditors. They complain that they are secured in neither of these forms; and they pray for an injunction and the appointment of a receiver as the only means left of intercepting these funds from waste and dissipation, and of securing them for distribution *pro rata* among creditors.

The bill in this case is addressed to the condition of things which has been described. It is not a bill such as a creditor usually files in his own interest for setting aside an assignment on the ground that it was made to hinder, delay, and defraud creditors. In almost all the states of the Union a bill for that purpose can only be brought by a creditor who has obtained a judgment or decree for his claim. In such a case, the grantee in the deed complained of has a lien by force of his deed, and the courts refuse to allow this deed to be assailed except by a creditor whose claim is equally as well authenticated. This creditor is required to have established a lien, and to show that he is without power to make it good, before assailing the deed of his debtor. His bill is "in execution" of his judgment or decree. Even such a creditor is not permitted to set aside the deed except upon proof not only that it is fraudulent, but that the grantee had notice of the fraud at the time of receiving it. If he can show these facts, then the creditor, in the decree setting aside the deed, is paid his full claim out of the property fraudulently converted in preference to other creditors. I fully concur in all the propositions of law announced by counsel for defendants in respect to bills of this character brought by individual creditors, in their individual interest, praying relief for themselves individually. As against such creditors the assignment of a debtor is good, whether giving preferences or not, if made *bona fide*, and if free from provisions from which the law in its policy presumes fraud.

But in the present case the creditor asserts no individual lien, claims no individual preference, and sues for all creditors. It is a creditors' bill, sometimes called an omnibus bill, being a bill *for all*. It is not directed at property alone, or property fraudulently appropriated within the purview of the statute of Elizabeth; but it is directed at all the assets of the defendants, as well that existing in the form of tangible property as that in the form of open accounts, notes due, and choses in action generally, for the ingathering of which a receiver is necessary. Mr. Wait, citing abundant authority, says of such a bill:

"It may be asked in what respects a creditors' bill differs from an ordinary bill in equity prosecuted to cancel a convinous conveyance. The answer is that the creditors' bill is broader and more effectual in its operation and results. The ordinary bill in equity is generally brought to unravel some particular transaction and to annul some particular conveyance. A creditors' bill is, on the other hand, usually in the nature of a bill of discovery, and more extended in its results; not only does it reach property described therein, but by means of this remedy every species of assets and even debts due the debtor, of which the creditor knows nothing, may be reached through the instrumentality of a receiver and applied to the claim." Wait, Fraud. Conv. 103, 104, and note.

In 2 Barb. Ch. Pr. 149, (a work written under the eye and under the correcting hand of Chancellor WALWORTH, and as useful as authoritative,) the author describes a creditors' bill as "a suit brought for the administration of assets, to reach property fraudulently disposed of, etc. The bill in such cases is filed in behalf of the complainant and all others standing in a similar relation, who may come in under such bill, and the decree to be made. It may be filed by simple contract creditors, and does not require a judgment to have been obtained."

It is true that creditors' bills are usually employed to settle up decedent or other estates, and to prevent a multiplicity of suits by creditors, each eager to establish by suit a priority of lien upon the assets out of which he is to be paid. But there is no principle of equity which confines these suits to any one class of cases. As society advances, and its methods of business undergo change, equity will adapt its relief to the changed condition of things. This is an old principle of equity. Indeed, equity jurisprudence originated in the necessity of applying new remedies to evils previously unknown to the law.

The case we are now dealing with is novel and peculiar; but the present proceeding is as old as equity itself. This is not a bill to set aside a deed. It is true that the dedication of assets which has been mentioned is objectionable in the particulars I have heretofore described; and this bill may be considered as one brought under section 2 of chapter 175 of the Code of Virginia to set it aside, that provision of the Code allowing bills of the sort to be brought by creditors who have not obtained judgment or decree, and have not established specific liens. But while in this view of the case I feel perfectly safe

on the score of jurisdiction, I prefer to regard the present bill as a creditors' bill of the kind described by the text writers Mr. Wait and Mr. Barbour.

It was such a bill as this that was filed in the case of *Finney v. Bennett*, 27 Grat. 365. The assets there administered were those of an insolvent bank owing several classes of creditors. The case was decided in circuit court by Judge WINGFIELD, who, in answer to objections of jurisdiction similar to those urged in the case at bar, delivered an opinion which was adopted as its own by the supreme court of appeals of Virginia when the case was taken there. He assimilated the suit to a creditors' bill brought against the estate of a decedent insolvent debtor in the hands of his personal representative. If creditors were left to sue individually, each would obtain a preference, to be paid in full according to the dates of their respective judgments, a few getting their whole debt, many getting nothing at all. The object of the bill was to prevent such a scramble and to secure a *pro rata* distribution to all. The court said:

"But it may be objected there is no precedent for such a case. Concede this. Yet it does not follow that when a case arises which comes within the principles of its constitution and ordinary jurisdiction, the court ought not to take cognizance of it because it is a new case and not to be found in the reports. * * * An eminent recent chancellor of England has declared that 'it is the duty of every court of equity to adapt its practice and course of proceedings, as far as possible, to the existing state of society; and to apply its jurisdiction to all new cases which, from the progress daily making in the affairs of men, must certainly arise.' Lord COTTINGHAM, [*Taylor v. Salmon*.] 4 Mylne & C. 141."

The supreme court of appeals of Virginia expressed its entire concurrence in this opinion, and adopted it as its own, adding: "What more suitable case could there be for a creditors' bill, and the application of the rule of equity, that 'equality is equity'? If there be no case directly in point, it is the province of a court of equity to provide suitable and adequate remedy for such a case;" and the court repeated the quotation from Lord COTTINGHAM. It also cited *Ogilvie v. Knox Ins. Co.* 22 How. 380, in which the United States supreme court held that a court of equity may, at the suggestion of creditors that a corporation is insolvent, administer its assets by a receiver, and thus collect all subscriptions or debts due the corporation.

We are not, therefore, without precedent for the present suit. This is not merely a creditors' bill praying injunction, receiver, and payment of all creditors *pro rata*, but is, as to complainants, a bill founded upon a particular equity entitling them to a standing in court. The bill would have been the same as many others with which the courts are every day occupied, if the defendants had done by deed what they are doing without deed. If in the case of a deed the court would have interposed to prevent the acts of defendant, how can it be contended that the mere absence of a deed deprives it of jurisdiction and divests complainants of a redress which a court of equity

only can give? It is an old principle that a court of equity will interpose to prevent what it would afterwards undo. *Roberts, Fraud. Conv.* 520. If defendants, by doing without making a deed what equity would undo if a deed had been made, can thereby deprive equity of jurisdiction, then creditors would be at the mercy of fraudulent debtors, and the courts would be set at defiance. Aside from this view, complainants have special equities in this case. They are the largest creditors of defendants. They have no security that if they accept the proposition of compromise, which they are willing to do, its terms will be complied with. Defendants offer, and I presume can give, no security, either in the persons of indorsers or in any other form, that they will fulfill their part of the compromise. Notwithstanding this inability, they are themselves administering the assets which they have dedicated to their creditors, and in a manner necessarily involving waste, and incompatible with the purposes of the trust. They offer, and I presume can give, no bond for properly administering these trust assets. There is but one mode in which complainants can insure the application of these assets to the purposes of the trust imposed upon them, and that is by the intervention of the court through the instrumentality of a receiver and an injunction. This is what they ask. Is not the court bound to give them the security of a responsible and judicial administration of the trust fund?

It is laid down as a general principle that if a trustee becomes insolvent and compounds with his creditors he may be removed; and this is on the ground that the *cestui que trust* has a right to have the trust administered by responsible trustees. *1 Perry, Trusts, § 279.* A man who has a common interest with others in a trust fund or trust estate, is entitled to sue on behalf of himself and others for the protection of the property by injunction, when the property is in the hands of an insolvent. *Kerr, Inj., citing Scott v. Becher, 4 Price, 346.* When the act complained of would, if done, be irremediable, the court will interfere as a matter of course, and take property out of the hands of irresponsible parties misapplying it. A bill will lie and injunction be granted in the case of a surviving partner who is embarrassed and is misapplying the funds, to restrain him from disposing of the assets. *Hartz v. Schrader, 8 Ves. 318.* In this case the injunction was given but a receiver refused. In the similar case of *Read v. Bowers, 4 Brown, Ch. 441,* an injunction was granted and a receiver appointed. There was no question of the jurisdiction of equity to interfere in either case.

On the whole, I have no doubt of the power of the court to entertain this bill, and to grant the relief for which it prays. I think, also, there is necessity for the intervention of the court in this matter by granting a preliminary injunction, and by appointing a receiver; and I will so decree.

GOLDSMITH v. SMITH and others, substituted for BALCH and another.

*(Circuit Court, D. Oregon. September 8, 1884.)***1. EJECTMENT.**

The action of ejectment, as defined and regulated by the Oregon Code of Civil Procedure, c. 4, tit. 1, is a possessory action, and although the estate or interest of the parties in the premises may be ascertained by the verdict therein, yet the plaintiff can only have judgment for the possession wrongfully withheld from him, with damages for such detention and costs; and the defendant can only have judgment for costs.

2. SAME—BETWEEN TENANTS IN COMMON.

A co-tenant cannot maintain this action against his co-tenant unless the possession is actually and wrongfully withheld from him, or his right thereto wholly denied.

3. CO-TENANTS—ADVERSE CLAIM BY ONE AGAINST THE OTHER.

Where a co-tenant is in possession, and another co-tenant claims an estate or interest in the premises held in common, adverse to him, his remedy is by a suit in equity for the purpose of determining such adverse claim, as provided in section 500 of the Oregon Code of Civil Procedure.

Action to Recover Real Property. Motion for judgment on the pleadings.

This action is brought by the plaintiff, a citizen of New York, to recover the possession of the undivided $\frac{3}{8}$ of the E. $\frac{1}{2}$ of the donation of Danford Balch, the same being claim 58, and parts of sections 28, 29, 32, and 33, in township 1 N., of range 1 E. of the Wallamet meridian, and situate in the county of Multnomah and state of Oregon. The plaintiff alleges that he is the owner in fee of an undivided five-eighths of the premises, and as such entitled to the possession thereof, and that from October 4, 1870, to December 31, 1883, "the plaintiff, his predecessors and grantors, were seized of the said premises so owned by him, and in the actual and adverse possession thereof."

The action is brought against John Balch and Alexander Hamilton, citizens of Oregon, and the persons in the actual possession of the property at the time. The complaint alleges that they, or those under whom they claim, are the owners of one undivided eighth of the premises, and that on December 31, 1883, the said defendants, denying the right and title of the plaintiff to three of the said five eighths, entered into and took possession of the same, and ousted plaintiff from the said three-eighths, and are now in the actual possession of the same, denying the right and title of the plaintiff thereto, and unlawfully and wrongfully withhold the possession of the said undivided three-eighths of said land from the plaintiff." Wherefore, they pray "judgment against the defendants for the possession of said three of said undivided five eighths."

The defendants Balch and Hamilton answered, alleging that they were in possession of the premises, in common with the plaintiff, as tenants of certain parties named Smith, Gilliland, Hamilton, Dickinson, and Walker, and on the same day said parties applied to the court to be made defendants in the action, in place of said tenants,

as provided in section 314 of the Code of Civil Procedure, which application was allowed.

Afterwards, these parties answered the complaint severally, setting forth the undivided interest of each in the premises, which in the aggregate amounts to four-eighths of the same. They also deny that the plaintiff is the owner of more than one-half of the premises, or that he is entitled to the exclusive possession of any part thereof, or that they ever ousted the plaintiff from three-eighths or any portion of the premises, or withheld the possession thereof from him; and allege that they and the plaintiff are tenants in common of the premises, and as such are in the possession thereof.

On the argument of the motion counsel for the plaintiff contended that section 324 of the Code of Civil Procedure should be construed so as to allow a tenant in common to maintain an action against his co-tenant when the latter has simply denied the extent of his estate or interest in the premises owned in common; while the counsel for the defendants insisted that the section was only applicable to an action at law to recover possession of real property, which could only be maintained according to it when the right of the co-tenant plaintiff to the "possession" of the premises was wholly denied by the defendant. The section reads as follows:

"In an action for the recovery of dower before admeasurement, or by a tenant in common of real property against a co-tenant, the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right, or did some act amounting to such denial."

This section is derived from the Revised Statutes of New York, pt. 3, c. 5, § 27, in which it is provided that in an action of ejectment between tenants in common, the plaintiff, "in addition to all other evidence which he may be bound to give," shall prove "that the defendant actually ousted" him, "or did some other act amounting to a total denial of his right as such co-tenant."

In the draught of the New York Code of Civil Procedure, reported December 31, 1849, the commissioners took this section and made it, in a modified form, section 890 of such draught, placing it in a title relating to "actions to determine conflicting claims to real property," under which it was intended that both legal and equitable rights and claims to real property might be prosecuted and determined. The modification consisted in extending the section to actions "for the recovery of dower before admeasurement," and providing that the plaintiff who claims as a cotenant must "show, in addition to the evidence of his right, that the defendant either denied the plaintiff's right or did some act amounting to such denial."

Subsequently, in 1862, the section was incorporated in the Oregon Code of Civil Procedure as section 324 thereof, and is a part of title 1 of chapter 4, relating exclusively to actions at law "to recover the possession of real property," with the addition of the words "of possession" inserted after the words "evidence of his right."

The Code also provides (chapter 5, tit. 8, § 500) for the determination of "adverse claims to real property" by a suit in equity. The section reads as follows:

"Any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest."

George H. Williams and James K. Kelly, for plaintiff.

P. L. Willis and James F. Watson, for defendants.

Before FIELD and DEADY, JJ.

FIELD, Justice. This is a motion for judgment that the complaint be dismissed, and that the defendants recover costs and disbursements, on the ground that the complaint "does not state facts sufficient to constitute a cause of action." It is in fact an attempt to obtain, by motion after answer, the benefit of a demurrer to the complaint, which must be regularly presented before answer. It can only be filed subsequently upon leave of the court and a withdrawal of the answer. The motion, therefore, in the form in which it is presented, must be denied. But as, by the pleadings, it appears that the plaintiff has presented his case upon the theory that one co-tenant of real property, in possession, can maintain ejectment against another co-tenant, also in possession, if the extent of the plaintiff's interest is denied, it may not be improper to call the attention of counsel to matters which are essential to the maintenance of the action, and consequently to the allegations of the complaint.

The action of ejectment is primarily for the possession of the property in controversy, the right to which may depend upon the ownership of the property, or a contract with the owner for the use of it,—a letting of it by him to the plaintiff. There must be in the plaintiff a present right of possession, which is withheld by the defendant. Code Civil Proc. § 313.

Now, each tenant in common has an equal right to the possession of the whole and of every part of the common property. If a tenant in common is in possession of any interest, no matter how small, he is, in law, in possession of the whole property. Therefore, no tenant in common, in possession, can maintain ejectment against a co-tenant also in possession. In such case he already has all that a judgment in his favor could give him. To sustain such an action the co-tenant plaintiff must be entirely excluded from the possession.

The statute (section 324 of the Code of Civil Procedure) does not change this rule of the common law; it only changes the proof of ouster, or rather makes a denial of the plaintiff's right of possession the equivalent of actual ouster, so as to authorize a recovery upon proof of such denial, when his right is otherwise established.

In the case at bar the complaint alleges that the plaintiff is the owner of five undivided eighths of the premises described, and was in their actual and adverse possession for a period exceeding 13

years,—from October 4, 1870, to December 31, 1883,—that on this last date the defendants entered upon three of these five eighths and excluded him from them, and withholds them from him; and that they are the owners of one undivided eighth. There is no allegation that the plaintiff has ever been dispossessed of the remaining two of the five undivided eighths. The necessary presumption, therefore, is that he is still in their possession. Being in possession as such owner, he is in possession of the whole premises, under the law which governs the rights of tenants in common. So, as the complaint now stands, the plaintiff cannot upon its allegations recover in ejectment. The allegation of ownership of the five-eighths must be reduced to that of three-eighths; or the ouster—that is, the denial of the plaintiff's right by the defendants—must be alleged to extend to the whole five-eighths. If, therefore, the present action is to be continued, the complaint must be amended in this form. But if the fact be as stated, that the plaintiff's right to three of the five eighths is only denied, and he continues in possession as the owner of two-eighths, while the defendants are admitted to be the owners of one-eighth, the plaintiff's remedy to determine the validity of the defendants' right to the disputed three-eighths is in equity, under the statute, (Or. Code Civil Proc. § 500,) authorizing suits for the determination of estates claimed adversely to the owner. Being in possession by his co-tenancy, the plaintiff can insist that the defendants disclose their alleged adverse interest, and call upon the court to pass upon its validity. In this way the interests and claims of the defendants, as against the plaintiff, can be fully determined.

While the motion, as presented, is denied, the plaintiff can have leave to amend his complaint as suggested, the defendants having the right to answer anew, or he can withdraw the present action and institute a suit in equity. Motion denied.

DEADY, J. I concur with the circuit justice, but wish to add that this motion is anomalous, and will not lie under any circumstances. It is made by the defendant, and is for "judgment on the pleadings,"—the pleadings being the complaint and answer. But, as a judgment on the pleadings cannot be given on the pleading of the party moving for it, unless the truth of the allegations therein is admitted by the subsequent pleading or silence of the adverse party, this is really a motion by the defendant for a judgment on the complaint. Now, there can be no judgment for the defendant on the complaint except upon the ground that it does not state facts sufficient to constitute a cause of action, and that objection or question can only be made by demurrer. So that if the defendant had made this motion before answer, still it would not lie. But the motion is also singular in the nature of the judgment it asks—"that the plaintiff's complaint be dismissed." A bill or suit in equity is said to be "dismissed" when finally disposed of adversely to the plaintiff therein; and un-

less the decree of dismissal is declared to be "without prejudice," it is a bar to any further litigation of the matter between the parties. But an action at law is disposed of either by a judgment for the plaintiff, or in bar of its maintenance, or of nonsuit. By either the first or second one the cause of action is determined and the action brought to an end; but by the third the action only is ended or disposed of, and another may be brought upon the same cause.

This judgment of nonsuit can only be obtained on motion of the defendant before trial, because of the failure of the plaintiff to appear for trial, or by consent. The form of it is "that the plaintiff take nothing by his writ or action, and that the defendant go hence without day;" and the effect of it, under the Code, is to dismiss the action. See Code of Civil Procedure, c. 2, tit. 11.

But a "motion" to dismiss "a complaint," whether at law or in equity, will not lie under any circumstances; and it proceeds upon a total misconception of the nature of legal procedure, both under the Code and at common law.

UNITED STATES v. HUNTER.¹

(Circuit Court, E. D. Missouri. September 16, 1884.)

INDIAN LANDS—NEGOTIATING LEASE OF, NOT AN OFFENSE—REV. ST. § 2116.

It is not an offense, within the meaning of section 2116 of the Revised Statutes, to negotiate, without authority from the United States government, a lease of lands for grazing purposes, from an Indian tribe to a corporation.

Demurrer to Petition.

R. Graham Frost and Robt. W. Goode, for informer.

Taylor & Pollard, for defendant.

BREWER, J. This is an action under section 2116 of the Revised Statutes to recover a penalty of \$1,000. The section is as follows:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation, or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars. The agent of any state, who may be present at any treaty held with the Indians under the authority of the United States, in the presence and with the approbation of the commissioners of the United States appointed to hold the same, may, however, propose to and adjust with the Indians the compensation to be made for their claim to lands within such state which shall be extinguished by treaty."

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

The petition charges that defendant, not being employed under the authority of the United States, attempted to negotiate a treaty and convention with the Cherokee Nation of Indians for a lease of certain lands, by inducing the principal chief of the Cherokee Nation and certain parties, the directors of the Cherokee Strip Live-stock Association, to sign the same. The lease is copied in full in the petition, and appears to be a lease of 6,000,000 acres of land for the term of five years for grazing purposes, and to have been executed by authority of the national council of the Cherokee Nation. To this petition the defendant demurred, and the question is whether inducing the execution of such a lease is a violation of the statute.

This question does not necessarily involve the validity of the lease; for, while the lease may be invalid, it does not follow that inducing its execution is a violation of the penal laws of the United States. The section quoted, being a penal one, is to be strictly construed. By this, of course, it is not intended that the language should be strained so as to exclude the act of the defendant, but simply that, giving the language a fair and reasonable construction, having in view the plain and ordinary meaning of the terms employed and the evident intent of congress, the act of the defendant must be clearly within the scope of the prohibition. This compels an analysis of the section. The first sentence declares that no purchase, etc., shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. The words "treaty or convention" are the significant words in the sentence. They generally mean compacts between states and organized communities, or their representatives. This is the ordinary signification of those words,—the first meaning which is suggested by their use. This is not doubted as to the word "treaty," and is scarcely admissible of doubt as to the word "convention," when used, as here, in connection with the word "treaty;" and that the two words are here used in that sense is made more obvious by the words which follow, "entered into pursuant to the constitution." Obviously, the language here refers to some public compact entered into by the United States, or under the authority of the federal constitution, with an Indian nation or tribe. Of course, it must be borne in mind that, while the Indian tribes and nations and their lands are within the general sovereignty of the United States, yet the government has always recognized a *quasi* national existence on the part of each Indian tribe, and has uniformly dealt with these tribes by treaty. So that this sentence emphatically declares the invalidity of any purchase, lease, or other conveyance of Indian lands except through the means of some public treaty. This, which I think the only fair interpretation of the sentence, is confirmed by the language in which, at the very inception of the government, this matter was sought to be regulated by statute. See section 4, p. 138, vol. 1, St. at Large, which was enacted in 1700, and reads as follows:

“And be it enacted and declared that no sale of lands made by any Indians, or any nation or tribe of Indians, within the United States, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at *some public treaty*, held under the authority of the United States.”

This sentence is the key to the whole section, and interprets its subsequent provisions. The second sentence contains the penalty. It provides that every person who, not being employed under the authority of the United States—that is, not authorized by the general government to represent it in treaty negotiations—attempts to negotiate *such* treaty or convention,—that is, the treaty or convention referred to in the first sentence, which, as we have seen, is a public national compact,—is liable to a penalty, etc. If this were all the language in the sentence, there would be scarcely any room for doubt. Obviously, it contemplates the casting of a penalty upon one who assumes to act for the United States, and, usurping an authority which he does not possess, attempts to negotiate a national compact or treaty with an Indian nation. But there is another clause in the sentence which renders the question of more doubt; that denounces the penalty on every person who attempts to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed. This seems to refer to an attempt, by private contract and personal arrangement, to obtain the lands of an Indian nation. But what kind of a private contract is denounced? The description is not as broad as in the first sentence, for there it speaks of purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, while here it is for “*the title or purchase of any lands.*” Does this include a mere lease for grazing purposes? I think not. A leasehold interest may be considered, for some purposes, a title, and sometimes the word “title” is used in a general sense so as to include any title or interest, and thus a mere leasehold interest; but here it is *the title*, and this, in common acceptance, means the full and absolute title; for when we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee and not that he is a mere lessee; and, this being a penal statute, no extended, no strained construction should be put upon the words used in order to include acts not within their plain and ordinary significance. That this is the true construction is sustained by the section immediately following, which reads:

“Every person who drives or otherwise conveys any stock, or horses, mules, or cattle, to range and feed on any lands belonging to any Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.”

This imposes a penalty on any one who, *without the consent* of an Indian tribe drives his stock to range and feed on the lands of such tribe. This implies that an Indian tribe may consent to the use of

their lands for grazing purposes, or, at least, that if it does consent no penalty attaches; and, if the tribe may so consent, it may express such consent in writing, and for at least any brief and reasonable time. It was said by counsel for the government that if a lease for five years can be sustained, so may one for 999 years, and thus the Indian tribe be actually dispossessed of its lands. But, as was stated in the opening of the opinion, the question here is not as to the validity of a lease, long or short, but as to whether this penal statute reaches to the mere inducing or negotiating of the lease. For the reasons I have thus given, it seems to me that it cannot be so interpreted; and whatever may be the fact as to the validity of such a lease, and entering into no discussion as to how far it is binding on the Indian nation, or whether it could be set aside at the option of the nation or by the action of the national government, I am of the opinion that the acts charged upon the defendant are not within the scope of this penal statute.

Therefore the demurrer to the petition must be sustained, and judgment entered for the defendant.

In re DAVISON.

(Circuit Court, S. D. New York. September 17, 1884.)

1. COURTS-MARTIAL—THEIR POWERS AS COMPARED WITH THOSE OF CIVIL COURTS.

Courts-martial are lawful tribunals existing by the same authority as civil courts of the United States, have the same plenary jurisdiction in offenses by the law military, as the latter courts have in controversies within their cognizance, and in their special and more limited sphere are entitled to as untrammelled an exercise of their powers.

2. SAME—AMENABILITY OF SOLDIERS AND SAILORS TO THEIR JURISDICTION.

Every one connected with the military or naval service of the United States is amenable to the jurisdiction which congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts.

3. SAME—WITHIN THE SCOPE OF THEIR JURISDICTION NOT REVIEWABLE BY CIVIL COURTS.

Provided a court-martial has jurisdiction to hear and determine and to render the particular judgment or sentence imposed, however erroneous the proceedings may be, they cannot be reviewed collaterally upon *habeas corpus*.

4. SAME—PRISONER PROPERLY BEFORE THEM HAS NOT BENEFIT OF WRIT OF HABEAS CORPUS.

A party legally in custody, awaiting trial by court-martial, (and he is legally in custody if the offense is one of which that tribunal has jurisdiction,) cannot avail himself of a United States civil court in a *habeas corpus* proceeding.

5. SAME—STATUTORY LIMITATION.

It is for the court-martial, and not for a civil court of the United States, to decide whether the statutory limitation contained in the 103d article of war can be invoked by a party accused of desertion to protect him from punishment.

6. SAME--PARTY IMPROPERLY ENLISTED--POWER OF SUCH COURTS.

If an alleged deserter was not ever duly enlisted in the United States service, he is not amenable to the jurisdiction of a court-martial.

7. MINORITY OF SOLDIER--EFFECT OF REV. ST.

The effect of sections 1116, 1117, and 1118 of the Revised Statutes is that the contract of enlistment of a minor under 16 years of age is void; but that over that age it is valid, in the absence of fraud or duress as to him; but during his minority it is invalid at the election of his parents or guardians.

Appeal from District Court. See S. C. 4 FED. REP. 507.

Asa Bird Gardner, for the United States, appellant.

Henry Grasse, for relator, respondent.

WALLACE, J. This appeal is brought to review the decision of the district judge for the Southern district of New York, discharging, upon a *habeas corpus*, the petitioner, Davison, from the custody of Capt. Wood, of the first regiment United States artillery, commandant of the post of Fort Columbus. It appears by the record that Davison enlisted in the army of the United States in July, 1870, for the term of five years; deserted while on furlough in February, 1872; was arrested as a deserter, and brought to Fort Columbus in October, 1880, and was held in the custody of the respondent to await trial by general court-martial at the time the writ issued. It further appears that the petitioner was but 19 years of age when he enlisted; that he had a mother living and dependent upon him for support, who never consented to his enlistment; and that during the entire period between the petitioner's desertion and apprehension he was within the city of New York. The petitioner's discharge was claimed on two grounds: *First*, that his contract of enlistment was void, and therefore he could not be held as a deserter; and, *secondly*, that if he was a deserter he was not amenable to trial, because more than two years had elapsed since the commission of the alleged offense. The learned district judge, in the opinion delivered by him, placed the petitioner's right to a discharge on the second ground.

Article of war 103 (Rev. St. § 1342) declares that "no person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." The district judge reached the conclusion that the offense of desertion was complete when the original act of desertion took place; that it was not to be deemed a continuing offense; and that the facts of the petitioner's desertion more than two years before his apprehension, and of his continued presence within the United States, being undisputed, he could not be tried or punished by court-martial, and should therefore be released from custody.

Upon this appeal a very elaborate argument has been made by the counsel for the military authorities to show that the statutory limitation of article 103 is not intended to apply to the offense of deser-

tion; and if, as would seem to be plain, the offense is a continuous one,—that is, is repeated completely every hour and every moment the soldier willfully absents himself without leave *animus non reverendi*,—there is certainly fair room to contend that the two years do not begin to run until he returns or is apprehended. On the other hand, if this construction of article 103 should obtain, it would appear that congress, while intending to shield the deserter from punishment for the original desertion, and possibly for his persistent contumacy during a long period of years, also intended to subject him to punishment for remaining in a state of desertion during the two years last preceding his voluntary return to service or his apprehension. Such a construction might lead to the singularly arbitrary and apparently useless result of punishing a deserter in his extreme old age, when his return to military duty would be useless and farcical, while exempting him from criminal accountability for the flagrant offense originally committed.

The conclusions which have been reached, however, render it unnecessary and possibly inappropriate to adjudicate here the question thus suggested. It must be held that it is for the court-martial and not for this court to decide whether the statutory limitation can be invoked effectually by the accused to protect him from punishment. If the petitioner was legally in custody awaiting trial by court-martial for a military offense, this proceeding must fail. He was legally in custody if the offense is one of which that tribunal has jurisdiction. It is not the office of a writ of *habeas corpus* to anticipate the action of the appropriate tribunal by determining, in advance of its investigation and judgment, whether the accused is innocent or guilty of the offense for which he is held for trial, any more than it is to perform the functions of a writ of error after a trial has been had. Courts-martial are lawful tribunals existing by the same authority that this court is created by, have as plenary jurisdiction over offenses by the law military as this court has over the controversies committed to its cognizance, and within their special and more limited sphere are entitled to as untrammelled an exercise of their powers. As is said in *Ex parte Milligan*, 4 Wall. 123: "The discipline necessary to the efficacy of the army and navy required other and swifter modes of trial than are furnished by the common-law courts; and, in pursuance of the power conferred by the constitution, congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of service is amenable to the jurisdiction which congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts."

The question of the jurisdiction of a general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, and so may that of every other judicial tribunal;

but the range and scope of the inquiry is controlled by the same rules and limitations in both cases. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed. If this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally upon *habeas corpus*. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pit. 193; *Ex parte Reed*, 100 U. S. 13-23. It would be as indecorous and as wanton a stretch of judicial power to assume in advance that a general court-martial will erroneously convict an accused person of a military offense, as it would be to indulge such a presumption concerning a common-law court.

The real inquiry is, therefore, whether the 103d article of war is a statutory inhibition upon the jurisdiction of courts-martial over offenses which appear to have been committed more than two years before the issuing of the order for trial, unless, by reason of the exception mentioned, the accused shall not have been amenable to justice within that period. The solution of this inquiry seems very plain. Articles 47 and 48 provide that any soldier who, having been duly enlisted in the service of the United States, deserts the same, shall, in time of peace, suffer such punishment, excepting death, as a court-martial may direct, and shall be tried and punished by a court-martial, although the term of his enlistment may have expired previous to his being apprehended. Although article 103 declares that no person shall be "liable to be tried and punished" by a general court-martial for an offense which appears not to have been committed within the two years, this language does not limit or qualify the jurisdiction of the military tribunals, but prescribes a rule of procedure for the benefit of the accused, to be considered and enforced upon the trial, in the exercise of a jurisdiction already conferred. The limitation is a matter of defense, which is to be entertained and determined like any other question involving an adjudication upon the merits of the case.

Language almost identical, declaring that no person should be "prosecuted, tried, or punished" for an offense not committed within two years before indictment found, was employed in the act of congress of April 30, 1790, § 31. In *Johnson v. U. S.* 3 McLean, 89, arising upon *habeas corpus*, the court held that although it appeared upon the record of conviction that the offense for which the relator was sentenced was not committed within the two years, no want of jurisdiction was apparent; that the court before whom he was tried had undoubted jurisdiction, and if the statute was a bar it should have been pleaded. In *U. S. v. Cook*, 17 Wall. 168, the defendant sought to avail himself of the benefit of the same statute by a demurrer to the indictment, and it was held to be a statute of limitations, and not available to the defendant by a demurrer.

The precise question under consideration was decided by the circuit court for the district of California by FIELD and SAWYER, JJ., in *Re*

White, 17 FED. REP. 723. It was there held, on a proceeding in *habeas corpus*, that the limitation prescribed by article 103 is a matter of defense, and that the court-martial was the tribunal having jurisdiction to try the charge of desertion, and to determine whether the limitation attached or not; and because of these conclusions the court refused to discharge the relator, and remanded him to be dealt with by the military authorities.

If the relator was not duly enlisted in the service of the United States, he is not amenable to the jurisdiction of courts-martial. Not only is this the plain deduction from the statutory provisions which confer jurisdiction upon these tribunals, but such would be also the result from general principles. If his contract of enlistment was void, the government acquired no right to his services; he never became a soldier, and could not be a deserter. The provisions of the laws of congress in force at the time of the relator's enlistment, so far as they affect the point, are reproduced in sections 1116, 1117, and 1118, Rev. St. The antecedent legislation of congress upon the subject does not seem to afford any aid in the construction of these sections. The prior acts are collated and referred to in *Re Riley*, 1 Ben. 408, and in *Seavey v. Seymour*, 3 Cliff. 439; but there is nothing in their provisions, and no decisions of federal courts in construction of them, which materially assists in solving the question whether, under the present laws, the enlistment of a minor over 16 years of age is void at his election. Section 1116 is as follows:

"Recruits enlisting in the army must be effective and able-bodied men, and between the ages of 16 and 35 years at the time of their enlistment."

Section 1117 enacts:

"No person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

Section 1118 enacts:

"No minor under the age of 16 years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony, shall be enlisted or mustered into the military service."

The reasonable conclusion warranted by these sections would seem to be that the contract of enlistment of a minor under 16 years of age is void; but that if he is over that age it is valid, in the absence of fraud or duress as to him, but during his minority is invalid at the election of his parents or guardian.

It is not open to doubt that congress, under the constitutional power "to raise and support armies," may provide for the enlistment of minors, with or without the consent of their parents, and may give such effect and conclusiveness to the contract of enlistment as it may deem best. And it is equally clear that where the laws of congress authorize the enlistment of minors no question of the capacity of the

infant to contract can arise. Whenever the common-law disability is removed by statute, the competency of the infant to do all acts within the purview of the statute is as complete as that of a person of full age. *U. S. v. Bainbridge*, 1 Mason, 71; *Rex v. Rotherfield Greys*, 1 Barn. & C. 345; Schouler, Dom. Rel. 560. Sections 1116 and 1118 authorize the enlistment of minors of the age of 16 years, and thereby affirm their competency to enter into a contract with the government in that behalf. And it seems obvious that section 1117 was not intended for the benefit of the minor or for his protection, because it has no application unless he has a parent or guardian who is entitled to his custody and control. If such minors are competent to contract, they are competent to bind themselves by any representation or estoppel that may be an ingredient of the transaction out of which the contract arises. In many cases the military authorities have no means of knowing whether the minor who applies to enlist has parents or guardians who are entitled to his custody and control. It is not reasonable to suppose that congress intended to place it in the power of a minor old enough to perform military service to deceive the military authorities by representing himself as of full age, or as without parents, or as manumitted from their control, and to recall his representations and repudiate his contract after he has been accepted as a soldier and received the benefits of his contract.

The provision should not be extended to protect a party competent to contract against the consequences of his deliberate agreement, or of his own misrepresentations, unless the language plainly requires such a construction. The language is satisfied by a construction which permits the parents or guardians who are entitled to the services and custody of the minor to intervene and assert their rights, if their consent to his enlistment has not been obtained. Several adjudications are to the effect that under section 1117, or former laws of congress of similar purport, the contract of enlistment should be held invalid on the application of the parents or guardian of the minor. *Com. v. Blake*, 8 Phila. 523; *Turner v. Wright*, 5 Phila. 296; *Henderson v. Wright*, Id. 299; *Seavey v. Seymour*, 3 Cliff. 439. None, however, are cited by counsel, or have met the attention of the court, in which it has been decided that the minor, if over 16 years of age, can assert the invalidity of his contract. The case of *Menzes v. Camac*, 1 Serg. & R. 87, arising under the act of March 16, 1802, is directly in point. The statute in that case was similar in its provisions to section 1117, and the court held the minor bound by his contract; that the parent alone could assert its invalidity; and therefore refused to discharge the minor upon *habeas corpus* at his own application.

Several adjudications are cited to the effect that the oath of the minor at the time of his enlistment is conclusive upon the question of his age. Some of these rest upon the language of the statute in force at the time. The more satisfactory ground for refusing the dis-

charge, as the law now stands, seems to be that the enlistment is void only as to the parent or guardian of the minor.

The order of the district court is reversed, and the relator is remanded to the custody of the officer having him in custody, and the writ discharged.

UNITED STATES *v.* FALKENHAINER.¹

(Circuit Court, E. D. Missouri. September 16, 1884.)

1. **STEALING LETTERS FROM POSTAL CAR**—SECTION 5469, REV. ST., CONSTRUED.

It is an offense punishable by imprisonment, under section 5469 of the Revised Statutes, for a person in the postal service to steal a letter from a postal car.

2. **SAME**—NOT A FELONY.

Stealing a letter from a postal car is not a felony.

3. **SAME**—INDICTMENT.

Where the offense charged is stealing a letter containing a treasury note, it is not necessary for the indictment to allege the ownership of the note.

4. **SAME**—EVIDENCE.

Where a postal clerk was charged with stealing letters from a postal car, and there was testimony tending to show that the letters stolen were taken from a straight package, which he had no right to disturb, *held*, that evidence was admissible to show what the contents of the package was when it was received, and that the letters it contained, which were not stolen, were admissible in evidence for that purpose.

Error to the District Court for the Eastern District of Missouri.

Indictment against a postal clerk for stealing letters from a postal car. The defendant was found guilty in the district court of stealing a number of letters from a postal car as charged, part of which contained and are stated in the indictment to have contained two one-dollar United States treasury notes each. The indictment gives the names of the parties to whom the letters were addressed, but does not allege the ownership either of the letters or their contents.

William H. Bliss, for the United States.

Thos. C. Fletcher and *Geo. H. Shields*, for defendant.

BREWER, J. The defendant was convicted in the district court, under section 5469 of the Revised Statutes, of stealing and taking from a postal car certain letters, and sentenced to hard labor for a term of two years. A bill of exceptions was signed, a writ of error allowed, and the case is now in this court for review. Several questions have been ably and elaborately argued by counsel. I shall notice the most important.

1. It is insisted that the section prescribed no punishment for the offense charged, and the case of *U. S. v. Long*, 10 FED. REP. 879, decided by Circuit Judge PARDEE, is cited as authority. With the highest respect for that distinguished judge, I cannot concur in his

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

conclusions. The specific objection is this: The section contains several clauses, each defining an offense against the postal service, separated from each other by a semicolon, and connected by no conjunction, copulative or disjunctive, and the last clause alone containing any express denunciation of penalty. So that the section reads thus: "Any person who shall steal the mail," etc.; "any person who shall take the mail," etc. Then, after several clauses separated in the same manner, the following: "Any person who shall, by fraud or deception, obtain," etc., "shall, although not employed in the postal service, be punishable," etc. There is in this last clause no word or expression which, in terms, refers to or includes the prior clauses, and the contention is that the penalty is denounced only on him who is guilty of the offense described in this last clause. When tried by the strict letter there is force in the objection; but it is as old as the Scripture that while "the letter killeth, the spirit maketh alive," and no better illustration can be found than the present; for if we keep to the mere narrowness of the letter, the first clauses, embracing five-sixths of the section, are not only without force to sustain the present indictment, but are absolutely dead and meaningless. They signify nothing, and congress, instead of defining these various offenses, might as well have filled up the section with a recitation of the Greek alphabet. I do not think that the courts are at liberty to set at naught the obvious intent of congress, and thus destroy the main body of this section. Courts will often look beyond the letter to the intent, upholding the latter even at the expense of the former. Indeed, the cardinal canon of construction is that the intent when ascertained governs, and to that all mere rules of interpretation are subordinate. *State v. Bancroft*, 22 Kan. 206. "A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers; and such construction ought to be put upon it as does not suffer it to be eluded." *Holmes v. Carley*, 31 N. Y. 290; *Bac. Abr. St. 1*, §§ 5, 10, and authorities cited. Plowden thus quaintly expresses the same thought in his commentary upon the case of *Eyston v. Studd*, 2 Plowd. 465:

"It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz., of body and soul. The letter of the law is the body of the law, and the sense and reason of the law are the soul of the law,—*quia ratio legis est anima legis*,—and the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel; and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit from the law if you rely upon the letter, and as the fruit and profit of the nut lie in the kernel and not in the shell, so the fruit and profit of the law consist in the sense more than in the letter. And it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive."

Doubtless the letter is first to be considered in order to determine the intent of the legislature, for the courts may not read a law simply as they wish it should read. But other matters may also be considered, and among them the evils sought to be remedied. It was resolved by the barons of the exchequer in *Heydon's Case*, 3 Rep. 7, as follows:

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: *First*. What was the common law before the making of the act? *Second*. What was the mischief and defect against which the common law did not provide? *Third*. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth. And, *fourth*, the true reason of the remedy."

In *Powtler's Case*, Lord COKE observes:

"It is frequent in our books that penal statutes have been taken by intendment, to the end that they should not be illusory, but should take effect according to the intention of the makers of the act." 11 Coke, 34.

Bishop, in his work on Statutory Crimes, says, in section 243:

"When the legislative meaning is plain, the exact grammatical construction and propriety of language may be disregarded, even in a penal statute. Courts interpret the word 'and' as disjunctive, and the word 'or' as conjunctive, when the sense absolutely requires it; and this, in extreme cases, in criminal statutes against the accused." Section 212: "A strict construction is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding captious objections and even the demands of an exact grammatical propriety." Section 81: "A statute will not be controlled by grammatical construction in such a way as to defeat its obvious meaning; * * * for example, conjunctive sentences describing different branches of the same offense will be construed as conjunctive or disjunctive, according as the sense and evident intention of the legislature may require; and words and expressions inaccurately used will receive the meaning intended, where it appears on the whole face of the act. Indeed, the clear intention of the legislature, as apparent on inspection of the statute, will prevail, though in opposition to the strict letter." Section 201: "The object of interpretation being to ascertain the legislative intent, the doctrine follows as a necessary consequence that whenever this intention is clear on the face of an enactment, no room is left for the application of any particular rules."

While doubtless the more natural form of expression would be to connect these separate clauses by the conjunction "and" or "or," or else to place in the denunciation of the penalty some inclusive word directly referring to all the previous clauses, yet without that the intended connection is plain. The fact that all these clauses are embraced in a single section is of itself a connecting fact, and shows the obvious intent of congress that all the various offenses defined should be subjected to the same penalty. Further, these clauses are not disconnected by periods into separate sentences, but by the semicolon are linked together in a single sentence. In fact, the semicolon may fairly be treated as binding each clause of definition to the single general penalty.

The case of *U. S. v. Pelletreau*, (14 Blatchf. 127,) is very closely in point. In it the court held as follows:

"But this construction of the section is entirely too strict, even for a criminal statute. It is stated that, if the conjunction 'and' had been inserted between the semicolon and the word 'any,' the statute would be complete; but the omission of the conjunction by way of ellipsis in such statutes is a very common thing. Sections 5463 and 5464, Rev. St., just above, present several instances of such omissions. The intention of the statute is as plain without the conjunction as with it. Manifestly, two classes of offenses were intended to be created,—one relating to the embezzlement of letters, etc., the other relating to stealing the contents of letters; and this intention is carried out if we suppose an ellipsis; while without an ellipsis a very considerable part of this section is useless and void. According, then, to the familiar rules of construction, the statute should be read so as to render its language effective; and by inserting the conjunction this is done. So read, it 'creates the offense charged in the indictment.'"

See, also, *U. S. v. Voorhees*, 9 FED. REP. 143.

These considerations and authorities lead me to the conclusion that the single penalty stated in the section is denounced against all the various offenses defined.

2. It is insisted that the purpose of congress in this section applies to one branch of the crime of larceny; that, therefore, the indictment should allege the ownership and value of the property stolen, and that it was feloniously stolen, taken, and carried away. I do not so understand the purport of the section. It simply creates an offense against the postal service, and was intended to protect the sanctity of the mails; and it is entirely immaterial whether the letters taken contained anything of value whatever. It may be remarked, in passing, that the indictment contained full description of the letters, so that the identification was complete. *U. S. v. Mills*, 7 Pet. 140; *U. S. v. Stone*, 8 FED. REP. 232; *U. S. v. Lancaster*, 2 McLean, 436; *U. S. v. Laws*, 2 Low. 117; *U. S. v. Baugh*, 1 FED. REP. 784; *U. S. v. Marselis*, 2 Blatchf. 111. This last case, also, very properly, as I think, disposes of the objection that the defendant, being in the postal service, could not be prosecuted under section 5469.

3. It is insisted that the offense charged against the defendant was a felony; that, therefore, he was entitled to 10 peremptory challenges. It is abundantly established by the authorities that in determining the classification of offenses under the laws of the United States into felonies and misdemeanors the courts will not follow the rules of classification established by the various states, but will be guided alone by the federal statutes and the common law. Now the offenses grouped together in this section are not declared therein to be felonies, nor are they offenses which existed at the common law. As heretofore stated, the section is not intended simply to define one form of larceny, but to protect the postal service and to preserve the sanctity of the mails; so, without regard to the amount of punishment which may be imposed, the general ruling has been to regard such

offenses as not felonies. See the case of *U. S. v. Wynn*, 9 FED. REP. 886, and the various authorities cited at the close of the opinion. It is unnecessary to review those authorities, or to enter into any extended discussion of the question, but it is sufficient to express simply a concurrence with the views expressed therein.

Finally, it is insisted that the court erred in the admission of 38 letters which are not mentioned in the indictment, and which the defendant was not charged therein with having taken and carried away. I think this testimony was competent. There was testimony tending to show that a straight package of letters from the west to Louisville passed through St. Louis,—a package which, by the well-understood rules and regulations of the post-office, was not to be disturbed at St. Louis, but forwarded in the condition it was received; that this package was opened by defendant, and out of it seven letters mentioned in the indictment taken. Now, these 38 letters were admitted as part of the straight package. It was competent to show that such a straight package was received, and to show what its contents were, and that is all what was done by the introduction of these 38 letters. Of course, such testimony tended strongly to show the intent of the defendant, for when the entire package should have been forwarded, his taking out seven letters and sending the others forward points strongly to an unlawful and criminal intent. It tends to show that here was no inadvertence or mistake on his part, and as such was admissible.

These are the material questions presented, and in them I see no error. Therefore the judgment will be affirmed and the same sentence imposed.

UNITED STATES v. MADISON.

(District Court, D. California. August 6, 1884.)

PERJURY—TIMBER CULTURE ACT—OATH—WHO CAN ADMINISTER.

To make a party liable to prosecution for perjury in a United States court, it does not matter that the oath taken by him when endeavoring to benefit by the "timber culture act" was taken before an officer authorized by a state, rather than one authorized by the United States to administer oaths.

Opinion Overruling Demurrer to Indictment.

S. G. Hilborn, U. S. Atty., and *Carroll Cook*, Asst. U. S. Atty., for the United States.

W. W. Morrow, for defendant.

HOFFMAN, J. It is not to be disputed that to constitute perjury or false swearing under the laws of the United States it must appear that the officer administering the oath was authorized to administer it by the laws of the United States of America. *U. S. v. Curtis*, 107 U. S. 671; S. C. 2 Sup. Ct. Rep. 507.

The section of the Revised Statutes (section 5292) under which this indictment in drawn, denounces in substance a false oath taken "before a competent tribunal, officer, or person," etc. The officer, tribunal, or person here referred to is an officer, tribunal, or person competent *under the laws of the United States* to administer the oath alleged to be false.

By the second section of the act of June 14, 1878, it is provided that the "person applying for the benefit of this act shall * * * make affidavit before the register or the receiver, or the clerk of *some court of record*, or officer *authorized* to administer oaths in the district where the land is situated." It is evident that the courts of record referred to include state courts of record as well as the United States courts. If the latter alone had been intended it would have been so stated. If the clerks of the United States courts were the only clerks of courts of record intended to be authorized to administer the oath, the expression "clerk of *some court of record*" is singularly inapt; and the object of the act, which is to encourage the growth of timber on the western prairies, would be to a considerable extent defeated, if the applicant is obliged, in the absence of the register and the receiver, to resort to the clerk of the circuit or of the district court, whose office may be remote from the district where the entry is to be made. If, then, as I cannot doubt, congress intended the affidavit to be made before the clerk of any court of record, the same policy demanded that the "officer authorized to administer oaths in the district where the land is situated should be an officer so authorized either by the state law or by the United States law." The words, "in the district where the land is situated," clearly point to a local officer residing or exercising his functions in the district, and who might be applied to without unnecessary expense or inconvenience.

If this be the true construction of the law, it follows that congress, by authorizing the affidavit to be taken before such officer, has rendered him "*competent*" to administer it as fully as the register or receiver, and the affidavit, if false, falls within the terms of the section under which the indictment is drawn.

It is not denied that the notary public, by whom the oath in this case was administered, was an officer authorized by the laws of this state to administer oaths in the district where the land is situated.

The demurrer must be overruled.

HOWE MACHINE Co. and others v. NATIONAL NEEDLE Co.

SAME v. WHITTEN and others.

Circuit Court, D. Massachusetts. September 30, 1884.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—APPLICATION OF OLD MACHINE—SIMILAR SUBJECT.

The application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in nature, will not sustain a patent, even if the new form has not been before contemplated.

2. SAME—PATENT No. 23,957—SPRING LATHE—MURDOCK LATHE.

Patent No. 23,957, granted to Charles and Andrew Spring, May 10, 1859, for an improvement in lathes for turning irregular forms, *held* anticipated by the Murdock lathe, and invalid.

In Equity.

Geo. S. Boutwell and Geo. E. Betton, for complainants.

A. L. Soule and J. E. Abbott, for defendants.

Before GRAY and NELSON, JJ.

NELSON, J. These suits are bills in equity for the infringement of patent No. 23,957, granted to Charles and Andrew Spring, May 10, 1859, for an improvement in lathes for turning irregular forms. The invention, as described in the specification, is a new combination designed for turning such articles as are to be brought to a point, or are to be finished or turned at one end, and therefore cannot conveniently be held to be operated upon otherwise than by the opposite end. It consists (1) of a gripping-chuck, by which the article is held by one end so as to present the other end free to be operated upon; (2) a rest preceding the cutting tool, to afford support to the article in the operation of turning; (3) a cutting tool; and (4) a guide-cam, or its equivalent, which modifies the movement of the cutting tool. The chuck may be of any of the well-known forms of gripping or holding chucks, which hold the article to be turned fast by one end. The material to be turned must be cylindrical and straight. In the drawings annexed, the guide-cam is of a form suitable for turning awls or machine needles, and the plaintiffs contend that their machine, as patented, was intended to be and is a lathe for turning sewing-machine needles or awls. The claim is for "the combination of a gripping-chuck, by which an article can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide-cam or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth."

The defendants have proved, by testimony which we cannot doubt, that as long ago as the year 1845, and perhaps still earlier, a machine was in use in the shop of William Murdock, in Winchendon, Massachusetts, which contained all the elements and the precise

combination of the Spring patent. It had the griping-chuck, the rest preceding the cutting tool, the cutting tool, and, instead of the guide-cam, its equivalent, a pattern,—all the parts arranged, combined, and operating in the same manner as in the Spring machine. It had, in addition, a fixed cutting tool preceding the rest, which served to reduce the material to the cylindrical form in which it is first received in the Spring lathe. But this extra tool formed no part and was wholly independent of the other combination. The machine still had all the elements of the Spring lathe in the same combination. The Murdock lathe was used for turning tapering wooden skewers or spindles for use in spinning yarn. It was not constructed so as to be capable of turning awls or machine needles from metal.

It has been decided by the supreme court that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated." *Pennsylvania R. Co. v. Locomotive Engine S. T. Co.* 110 U. S. 490; S. C. 4 Sup Ct. Rep. 220. Applying this rule to the present case, we are of opinion that the application, to the turning of machine awls and needles from metal, of mechanism old and familiar in the art of wood-turning, is not invention, and is not patentable. We therefore decide that the Murdock lathe was an anticipation of the Spring invention, and that the complainants' patent is void for want of novelty. This view of the case renders it unnecessary for us to consider the other matters urged in defense of the complainants' suit at the argument.

The entry in each case will be: bill dismissed, with costs.

SPILL v. CELLULOID MANUF'G CO.

(Circuit Court, S. D. New York. August 21, 1884.)

1. PATENT LAW—MANUFACTURE OF XYLOIDINE.

Patents Nos. 97,454 and 101,175, for certain improvements in the art of dissolving and manufacturing xyloidine, *held* invalid by the court.

2. SAME—PATENTABILITY—REQUIREMENTS OF CONSTITUTION AND STATUTES.

Under the constitution a patent can be granted only for an *invention*, and under the statute the thing for which a patent may be granted must be not only new and useful, but must amount to an invention or discovery.

3. SAME—SOLVENTS OF PYROXYLINE—MODIFICATION OF WELL-KNOWN SOLVENTS.

Before the invention by Spill (1869) the world was informed that dehydrated or strong alcohol combined with camphor was a solvent of pyroxyline. This being the case, the use of alcohol of less strength, and yet of sufficient strength for the purpose, was no invention. *Smith v. Nichols*, 21 Wall. 112-119.

4. SAME—BLEACHING XYLOIDINE—ADAPTATION OF FAMILIAR PROCESS.

In the operation of bleaching xyloidine the employment of ordinary bleaching materials (although heretofore not contemplated as adapted for the pur-

pose in connection with this substance) is not patentable. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 140; S. C. 4 Sup. Ct. Rep. 220.

In Equity.

B. F. Thurston and H. A. Ruggles, for plaintiff.

W. D. Shipman, F. H. Betts, H. Baldwin, Jr., and E. L. Hamilton, for defendant.

BLATCHFORD, Justice. This suit was brought on two patents granted to the plaintiff. One is No. 97,454, granted November 30, 1869, for an "improvement in dissolving xyloidine for use in the arts." The other is No. 101,175, granted March 22, 1870, for an "improvement in the manufacture of xyloidine and its compounds." On a hearing on pleadings and proofs, a decision was made (18 Blatchf. C. C. 190; S. C. 2 FED. REP. 707) in favor of the plaintiff on both patents. An interlocutory decree was entered June 12, 1880, declaring both patents to be valid, and to have been infringed, and awarding a recovery of profits and damages, to be ascertained by a reference to a master, and a perpetual injunction. The report of the master was filed February 25, 1884. The conclusions of the report, as matter of law, are, as to No. 97,454, that the master, not having been furnished with the necessary data, is unable, without further proof, to report any profits; and, as to No. 101,175, that, not having been furnished with the necessary data, he is unable, without further proof, to report any profits; and that no evidence had been presented on the accounting, relating to the question of damages from the infringement of either patent. The plaintiff has filed 11 exceptions to the report, and claims, as to No. 97,454, that profits have been shown amounting to \$276,667.66, with interest from June 12, 1880; and, as to No. 101,175, that profits have been shown amounting to \$504,306.25, with interest from June 12, 1880. The defendant has filed six exceptions to the report. The exceptions have been heard, and at the same time the defendant has moved the court, on the report and the exceptions, and the evidence taken in the cause subsequently to the interlocutory decree, both before the master on the accounting and on a motion made by the plaintiff for an attachment for a violation of the injunction, and on all the proceedings in the cause, for a reconsideration of the questions of novelty, patentability, and infringement, passed upon by the court at the time of the entry of the interlocutory decree, in view of the evidence since introduced into the case, and in view of the decision of the supreme court in *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 490, S. C. 4 Sup. Ct. Rep. 220, and for a correction or setting aside of said interlocutory decree, and such other orders as may have been erroneously made in this cause.

What was said about No. 97,454, in the former decision, was this:

"The specification states that the 'invention relates to the preparation and use of certain solvents of xyloidine, and which differ from the ordinary known

solvents of xyloidine, in that these *menstrua* which are employed are not, necessarily, in themselves, solvents of xyloidine, but become so by the addition of the bodies, compounds, or substances herein referred to.' It also states that the invention consists in the employment of eight different solvents. Only the second solvent is alleged to have been used by the defendant. It is thus described in the specification: 'Camphor, or camphor oil, or mixture of the same, in conjunction with alcohol or spirits of wine, the same to be employed in about equal proportions.' The claim is in these words: 'The preparation and use of solvents of xyloidine, such as have been before described, so as to render xyloidine more easy of conversion into compounds containing xyloidine, which are suitable for applications in the arts, and for industrial purposes.' The defendant has infringed this claim by using camphor in connection with alcohol as a solvent of xyloidine. The defendant mixes ground and dried xyloidine with pulverized dry camphor, and then immerses the mixture in alcohol until the xyloidine is dissolved. It is dissolved by the joint action of the camphor and the alcohol. Neither alone is a solvent of xyloidine. It is immaterial, so far as the invention and the claim of the patent are concerned, whether the camphor and the alcohol are mixed so as to dissolve the camphor in the alcohol, and then the xyloidine is put into the solution, or whether either the alcohol or the camphor is first mixed with the xyloidine, and then the third substance is added. The bringing of the three together, causing the xyloidine to be dissolved or softened, so as to be more easy of conversion or working into compounds or articles containing xyloidine, is the invention. Making use of the solvent power of camphor and alcohol when in the presence of each other, and of the xyloidine, is the essence of the invention. The use of the camphor and the alcohol in about equal proportions is not the essence of the invention. They are stated by the patentee to be useful in those proportions. But the evidence shows that the real invention was the discovery of the fact that camphor and alcohol, when united, would be a solvent of xyloidine.

"The novelty of the invention of this solvent is attacked, but without success. The evidence is voluminous, and has been carefully considered, with the result that the defendant has failed to show want of novelty. The prior patents adduced and examined are the English patent to Cutting, No. 1,638, of 1854; and the English patents to Parkes, No. 2,359, of 1855; No. 2,675, of 1864; No. 1,313, of 1865; No. 1,695, of 1867; and No. 1,614, of 1868. Parkes' pamphlet, of 1867, and Gmellin's Hand-book of Chemistry, of 1860, have also been considered, as well as the English patent to the plaintiff, No. 2,666, of 1867. No other anticipation than the above seems to be considered by the defendant's expert, and he does not allude to the pamphlet. Another defense relied on is that one Parkes communicated to the plaintiff, in England, the knowledge that alcohol and camphor united were a solvent of xyloidine, and that the plaintiff never made the invention himself. On the whole evidence the defendant has failed to establish this defense." 2 FED. REP. 707, 708.

The Parkes patent, No. 2,359, of October 22, 1855, says:

"It is well known that a solution of gun-cotton has been used principally as a photographic agent and in surgical operations, but my object is to employ collodion or its compounds for manufacturing purposes generally. The method of dissolving gun-cotton being well known, I do not think it necessary to give proportions, but simply to say that when I use a thin solution I add more of either of the solvents to the gun-cotton; and, if I require a stiff preparation, less of the solvent is to be used. I dissolve gun-cotton, or other similar compounds, in vegetable naphtha, alcohol, methylated or other ethers, or other solvents of gun-cotton."

By "gun-cotton" it is understood was meant what is called "xyloidine," in No. 97,454.

The Parkes patent, No. 2,675, of October 28, 1864, says, in the provisional specification:

"In manufacturing compounds of gun-cotton, and of other vegetable substances similarly prepared, I first distil wood naphtha, or alcoholic spirit, over chloride of calcium, chloride of zinc, or chloride of manganese, using by preference the solid or fused salts. I employ the spirit obtained by this process, alone or combined, with the light spirits from coal naphtha, or other mineral naphtha, as solvents of gun-cotton or analogous compounds."

The full specification says:

"In manufacturing compounds of gun-cotton, I employ a solvent which I prepare by distilling wood naphtha with chloride of calcium."

It then describes the mode of distilling and of obtaining the solvent, and says:

"The solvent thus prepared I add to the gun-cotton, usually in such a proportion as to produce with it a pasty mass. * * * In place of preparing the solvent with wood naphtha, it may be similarly prepared with alcohol. * * * In place of gun-cotton, properly so called, other vegetable substances, similarly prepared, may be employed, and so in each case where, in this specification, the use of gun-cotton is directed."

The Parkes patent, No. 1,313, of May 11, 1865, is for "improvements in the manufacture of parkesine, or compounds of pyroxyline, and also solutions of pyroxyline, known as collodion." It is understood that "pyroxyline" is the same thing as "xyloidine." It says:

"The materials now well known as parkesine consist of pyroxyline dissolved in or softened by solvents, and usually mixed with coloring matters, oils, and substances which control the inflammability of the pyroxyline. In manufacturing parkesine on a large scale, in accordance with the specifications of former patents granted to me, and when manipulating large masses of material, I have found considerable difficulty in the employment of the volatile solvents hitherto used. By the present invention I am enabled to produce large masses or quantities in a much better condition, in a shorter time, and with less solvent in proportion to the pyroxyline, than is possible with the solvents hitherto used. According to my present invention I employ as solvents of the pyroxyline, in this manufacture, nitro-benzole, aniline, and glacial acetic acid. When these solvents are employed, the parkesine can be worked freely in the air; or, these solvents may be used in combination with other solvents. I also, according to my invention, render the ordinary volatile solvents more suitable for use by the addition of camphor. By this means I obtain to some extent the same advantage as by the use of a less volatile solvent. Nitro-benzole and aniline are not rapidly volatile except at a high temperature, and this property enables me to employ them alone, or with other solvents, with very great advantage, as the dissolved pyroxyline and its combinations can be worked in rolls, and, by calendering or spreading machines, with great facility, not drying too rapidly, which enables me with facility to coat telegraph wire, or to make masses or sheets, or to spread the combinations on textile or other fabrics, to produce water-proof cloth for garments, or other articles of any size or color; and the same advantage I obtain when I employ aniline, camphor, or acetic acid; and the combinations, especially those made with nitro-benzole or aniline, can be worked freely in the open air. * * * The following is the manner in which I prefer to

proceed in producing parkesine according to this invention. I take 100 parts of pyroxyline and moisten it with the ordinary solvent, by preference naphtha distilled off chloride of calcium, as is described in the specification of a former patent granted to me, and as is now well understood; and I press out the excess of solvent by an hydraulic press. I then add the other solvent in the proportion of from 10 to 50 parts of prepared nitro-benzole or aniline; or I add 10 to 50 parts of camphor, then 150 to 200 parts of vegetable oil. I use cotton-seed or castor-oil by preference. This mixture I grind in rolls, which are by preference warmed by steam admitted into them. The grinding is continued until all is well combined as a dough or paste, which will be more or less stiff according to the quantity of solvent employed."

The "former patent" thus referred to is the patent No. 2,675, which describes, as a solvent, wood naphtha distilled off chloride of calcium, and the wood naphtha so distilled is what is referred to in No. 1,313 as the "ordinary solvent," and as one of "the ordinary volatile solvents," which may be rendered "more suitable for use by the addition of camphor." And as, according to the language of No. 2,675, a solvent may be "similarly prepared" by distilling alcohol with chloride of calcium, alcohol so distilled must be regarded as an "ordinary solvent," and as one of "the ordinary volatile solvents," which is, according to the language of No. 1,313, to be rendered "more suitable for use by the addition of camphor." No. 1,313, therefore, describes the method of proceeding to be: to moisten 100 parts of pyroxyline with alcohol distilled off chloride of calcium; to press out the excess of solvent; to add 10 to 50 parts of camphor, this being stated to be optional, instead of adding 10 to 50 parts of the prepared nitro-benzole or aniline; to add 150 to 200 parts of vegetable oil; and to grind the mixture in rolls till it is a dough or paste.

The Parkes patent, No. 1,695, of June 8, 1867, sets forth the mode of preparing what it calls a "parkesine compound." It says:

"The parkesine compound I prepare by thoroughly mixing in a vessel, with a mechanical stirrer, one part, by weight, of pyroxyline with six or eight parts of dehydrated or strong alcohol. The alcohol obtained by distilling the commercial alcohol off fused chloride of calcium and other similar substances is suitable. I also add in the mixing vessel cotton-seed oil or castor-oil in the proportion of from 5 to 10 per cent., by weight, of the cotton. The plastic mass of pyroxyline and solvent and oil, which is obtained from the mixer, is passed repeatedly through grinding rolls until perfect uniformity throughout the mass is obtained, and, at the same time, from 2 to 5 per cent. of resin, by preference gum copal of good quality, may be worked in. The grinding rolls should be inclosed in a casing and heated by steam. There are shelves in the casing to enable the workmen to handle the material. The solvent which evaporates is recovered by passing the vapor through a condenser. * * * In place of using alcohol alone for the solvent of the pyroxyline, as above described, I sometimes use a mixture of equal parts of light mineral naphtha, sp. gr. 850, and strong alcohol, sp. gr. 825, or methylated alcohol, sp. gr. 855. I use the mixed solvents in the preparation of the plastic mass in the proportion of 5 or 6 parts to one part of pyroxyline; or I sometimes make a compound solvent of equal parts of light mineral naphtha, purified vegetable naphtha, sp. gr. 840, and alcohol; and, in preparing the plastic mass, I use it in the proportion of 5 or 6 parts to one part of the pyroxyline."

No. 2,359 distinctly states that gun-cotton is dissolved in alcohol. Nothing is said about distilling or preparing the alcohol, or dehydrating it. In No. 2,675 alcoholic spirit is described as distilled over chloride of calcium, and then employed, either alone or combined with the light spirits from coal naphtha or other mineral naphtha, as a solvent of gun-cotton. No. 1,313 describes the use, as a solvent of pyroxyline, of alcohol distilled off chloride of calcium, combined with camphor, the alcohol so distilled being called an ordinary volatile solvent. In No. 1,675 dehydrated or strong alcohol, obtained by distilling commercial alcohol off fused chloride of calcium, is described as a solvent of pyroxyline, either alone, or mixed with light mineral naphtha. In No. 1,313 the pyroxyline is moistened with the ordinary solvent, and then the camphor and oil are added, and the mixture is ground. In the defendant's manufacture the xyloidine and the dry camphor are mixed and then ground together, and the ground mixture is steeped in alcohol. No. 97,454 claims broadly the use of camphor, in conjunction with alcohol, without reference to any order of manipulation. It covers equally the liquid resulting from the combination of alcohol and camphor, to which the xyloidine is added, and the mixing of the xyloidine first with either the alcohol or the camphor, and the addition of the other ingredient.

In No. 1,313 the ordinary volatile solvent, alcohol distilled off chloride of calcium, is used to moisten the pyroxyline, and the camphor is added, which, the patent says, has the effect to render such ordinary volatile solvent more suitable for use. The camphor is stated to be used in place of prepared nitro-benzole or aniline, which is a solvent. The camphor, therefore, co-operates with the alcohol, and the combination acts as a solvent. In No. 97,454 it is said that the solvents of that patent "differ from the ordinary known solvents of xyloidine in that these *menstrua* which are employed are not necessarily, in themselves, solvents of xyloidine, but became so by the addition of the bodies, compounds, or substances herein referred to." In the former decision it was said that the invention of Spill was "the discovery of the fact that camphor and alcohol, when united, would be a solvent of xyloidine." It was also said that the defendant dissolved its xyloidine "by the joint action of the camphor and the alcohol," and that "neither alone is a solvent of xyloidine." Whether either alone is or is not a solvent of xyloidine is of no importance. The defendant employs as a solvent the combination of alcohol and camphor. That is what No. 97,454 claims—employing as a solvent camphor in conjunction with alcohol. What No. 97,454 says is, that the *menstrua* employed are not "necessarily, in themselves," solvents of xyloidine. Yet, if what is employed is essentially a combination of spirits of wine and camphor, it is an infringement of No. 97,454; and, if what was essentially a combination of spirits of wine and camphor was before described as a solvent, No. 97,454 is not valid.

The only point remaining is, as to the use, in No. 1,313, in connection with camphor, of alcohol distilled off chloride of calcium. No. 1,695 shows that commercial alcohol so distilled is nothing but dehydrated alcohol, alcohol deprived of its water, alcohol made strong, and that, alone, it is a solvent of pyroxyline. Commercial alcohol has more or less water. The water acts no part as a solvent. The object is to get rid of the water and avail of the spirit. It is the spirit which is effective. To dehydrate the commercial alcohol, or deprive it of its water, or make it strong alcohol, or absolute alcohol, which is done by distilling it off chloride of calcium, is only to concentrate it, and thus entitle it the better to be called alcohol or spirits of wine. When distilled, it is yet alcohol. When not distilled, it is called alcohol. When strong, made absolute, freed from water, concentrated, it was and is of itself a solvent of xyloidine; and in that state it was, before Spill's invention, described as used with camphor as a solvent of xyloidine. The only question was as to the strength necessary for the alcohol,—as to how much water it might contain and yet be a solvent with the camphor. There could be no invention in using alcohol of less and less strength, until a point was reached, as to weakness, beyond which it would not answer to go. Spill gives the date of his invention as the early part of 1869. Before that the world was informed that dehydrated or strong alcohol was of itself a solvent of pyroxyline, and was instructed to mix it with camphor as such solvent. It must be strong enough in spirits to do its work. Using it of less strength and yet of sufficient strength was no invention. To use dehydrated alcohol with camphor would infringe No. 97,454, and yet it would be to use only what was before described. Under the Constitution a patent can be granted only to an inventor; and, under the statute, the thing for which a patent may be granted must not only be new and useful, but it must amount to an invention or discovery. "A mere carrying forward, or new or more extended application, of the original thought; a change only in form, proportions, or degree; the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results,—is not such invention as will sustain a patent." *Smith v. Nichols*, 21 Wall. 112, 119.

Being satisfied that due weight was not given to these considerations, in connection with the state of the art, as shown at the hearing which resulted in the interlocutory decree, and that that decree ought not to have been made, no other result can be reached than that effect must be given to this conclusion, and No. 97,454 be held invalid, so far as it claims the preparation and use of camphor in conjunction with alcohol or spirits of wine, as a solvent of xyloidine.

As to No. 101,175, the former decision said:

"There are five claims in the patent. The second alone is alleged to have been infringed. The specification says: 'The second part of my invention relates to the bleaching of xyloidine, and is as follows: When it is desired to

bleach or whiten xyloidine, I bleach it directly after the removal of the acids, and before removing it from the vat. This I do by any of the well-known means, preferring a solution of chlorine or a solution of chloride of lime or soda, which I add to the xyloidine, making use of alternate stirrings, and rest, for a sufficient time, until the xyloidine is whitened. The solution is again drained off, and the xyloidine is repeatedly washed with water in order to remove any excess of bleaching agents or any residue from such agents, when it will be found to be ready to be submitted to pressure in order to free the same from water, and may then be opened out so as to prepare it for drying, dissolving, or other purposes.' The second claim is in these words: 'The process of bleaching xyloidine in the manner herein specified.' That portion of the specification which precedes the statement of the second part of the invention relates to the treatment of vegetable fiber or lignine with acids, to convert it into xyloidine and render it soluble in suitable solvents. The fiber is intimately mixed with the acids by appropriate means, then the acids are strained and pressed from the fiber, which is now xyloidine, and it is subjected to a washing and stirring with water until it is nearly or quite free from acids, and the water is then drained off. The washing is done in a washing vat. The bleaching, as before stated, is done directly after the removal of the acids, and before the xyloidine is removed from the vat. The evidence shows that the real invention of the plaintiff, in this regard, was to bleach xyloidine by ordinary bleaching agents directly after the converting acids had been washed out of it, and before anything had been mixed with it which might interfere with the action of the bleaching agents. This is fairly the sense of the specification.

"Whether the bleaching is done in the washing vat or not, or in a solution of the ordinary bleaching agent, or by such agent not in a solution, are immaterial matters. The essential discovery was that an ordinary and well-known bleaching agent, of the character of chlorine, or chloride of lime, or chloride of soda, if applied to xyloidine, when it had become such, and had been freed from the converting acids, and while it remained in that state, would act upon it to bleach it. The defendant treats paper with acids to make xyloidine, then washes out the acids, then grinds it, and, while it is being ground, applies bleaching powders to it. The evidence is satisfactory that one of such bleaching powders is permanganate of potash, and that it was a well-known and ordinary bleaching agent at the time of the plaintiff's invention. Therefore, infringement is established. It is contended for the defendant that the claim in regard to bleaching does not claim a patentable invention, because it is merely the use to bleach xyloidine of what had before been used to bleach fibrous material not converted into xyloidine. The true view is well expressed by Professor Seeley, the plaintiff's expert. The defendant's expert, Mr. Edward L. Renwick, had cited four English patents—those to Martin, No. 7, of 1864; to Reeves, No. 2,797, of 1860; to Collyer, No. 550, of 1859; and to Reeves, No. 3,293, of 1866—as describing the treatment of vegetable fiber with a solution of chloride of lime or of soda, substantially as the plaintiff's patent describes xyloidine as being treated with a solution of chloride of lime or of soda. Professor Seeley says: 'The patents referred to by Mr. Renwick cover inventions relating to bleaching, by means of ordinary bleaching agencies, the ordinary fibrous substances which are used for clothing, paper stock, etc. I do not find in them anything which has more bearing upon the novelty of Spill's invention than what might be included in the matter which Spill regards and defines as old and well known. Previous to Spill's time, the ordinary bleaching materials and methods were only applied to a peculiar class of substances; namely, those substances of fibrous character which were useful mainly by reason of that fibrous character. Spill's invention brings the utility of bleaching upon a new kind of material, and brings it where it was very desirable, but where it was sup-

posed to be impracticable. It is true that pyroxyline (xyloidine) has a fibrous structure, but this fibrous structure is not any essential or useful property in it. In fact, in this art pyroxyline does not become useful until the fibrous structure is destroyed. Pyroxyline is not useful for any of the purposes to which the materials formerly bleached were applied. Pyroxyline is very different in chemical character and composition from the old bleachable materials. If pyroxyline had not the fibrous structure, probably the question of invention in this case would not have arisen, for then it would have appeared plainly that the case would have been similar to that of (suppose) bleaching charcoal by ordinary bleaching agents. In advance of experiments, the bleaching of a substance like pyroxyline would seem impracticable, almost incredible. The theory of ordinary bleaching is that the coloring matter of goods to be bleached is of a complicated and unstable character, and is destroyed by the powerful chemical action of the bleaching agents, chlorine, oxygen, etc. Inasmuch as pyroxyline, in its manufacture, has been exposed to the action of some of the most powerful chemical agents which are known, it is unreasonable to suppose that any of the unstable coloring matter could be left in it. The bleaching of pyroxyline has often been proposed and attempted; it was especially desirable in this art; but it is my opinion that a chemist would exhaust all other theories before he would think of ordinary bleaching agents for the purpose. The subject had come up in my mind several times before Spill's invention, and I was unwilling to credit the efficacy of his plans until they were actually demonstrated to me. I know of very few inventions where so novel and useful results have been obtained by such simple and unlooked-for methods.' There is no evidence to counteract this view."

The decision in *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.* 110 U. S. 140, S. C. 4 Sup. Ct. Rep. 220, makes it impossible to sustain the view heretofore announced as to No. 101,175. The ruling in that case is that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

In the Martin patent—No. 7, of 1864—fabrics composed partly of vegetable and partly of animal material, and other fabrics and materials, designed to be used in making paper, are boiled with lime and soda or potash in a rotating boiler provided with heaters, and the cleaned rags are then bleached in the boiler by an "ordinary bleaching liquid, consisting of a solution of chloride of lime or soda, with a preparation of sulphuric acid."

In the Reeves patent—No. 2,797, of 1860—jute and other fibers of a similar nature, intended to be made into pulp for paper, are boiled in an alkali, then treated with chloride of soda or lime under heat, then immersed in a bath of chloride of lime of moderate strength, to which is added a small quantity of diluted sulphuric or hydrochloric acid, then boiled in a weak caustic alkaline solution, whereby a large quantity of coloring matter is extracted, then washed, and then treated in a solution of chloride of soda or lime, or both together, so that a perfect white will be the result.

In the Collyer patent, No. 550, of 1859, straw, flax, and other ma-

terials, to be used in making paper, are boiled in caustic alkali, then washed, and then bleached in a chloride of lime solution.

In the Reeves and Muschamp patent—No. 3,293, of 1866—vegetable fibers or common rags, to be made into paper for explosive purposes, are boiled in caustic alkali and washed, and then a solution of chloride of lime is employed to disintegrate and bleach them, a small quantity of diluted sulphuric or other acid being added to the chloride of lime.

The validity of No. 101,175 was rested by the plaintiff at the original hearing, and is now rested, on this alone, as a claim of invention—that he discovered that xyloidine, or soluble gun-cotton, made by the use of substances so powerful as nitric and sulphuric acids, could be bleached by ordinary bleaching materials. The view urged and admitted, as sustaining the patent, was, that no one could or would have believed, in advance, that it was possible. But, the old process of bleaching by ordinary bleaching agents was applied to vegetable fiber, with no change in the manner of application, and with the same distinct result of bleaching. The only difference was that the product was bleached vegetable fiber in the shape of converted gun-cotton, instead of bleached vegetable fiber not so converted. The fact that bleached gun-cotton had not before been known or contemplated did not make the bleaching of it in that way a patentable invention, in view of the state of the art. What was done was to bleach by a process which acted objectively on the material and left it the same thing as before bleaching, but in a bleached state. The bleaching agent did not form with the material a new chemical product. No. 101,175 says that the bleaching solution, after the xyloidine is whitened, is drained off, and the bleached article is repeatedly washed with water to remove any excess of bleaching agents, or any residue from such agents. It also states that the material to be used to make "soluble gun-cotton or xyloidine" is "cotton or other vegetable fibers or lignine, either in their normal condition or after they have passed through any manufacturing process, or the refuse of the same, or the ordinary rags of commerce, either in a white, dyed, or colored condition."

In the case of *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, the decision of the circuit court was reversed on the question of patentability, and the rules laid down show that under it, and the cases which the opinion cites and approves, the decision in the present case as to No. 101,175 ought to have been that claim 2 set forth no patentable invention.

Within the principle applied in *Wooster v. Handy*, 21 FED. REP. 51, the court has the power and it is its duty to dismiss, with costs, the bill in this case; and it is so ordered.

**MATTHEWS and another, Surviving Executors, etc., v. IRON-CLAD
MANUF'G Co.**

(Circuit Court, S. D. New York. August 21, 1884.)

PATENT LAW—IMPROVEMENT IN SODA-WATER FOUNTAINS.

Alleged infringement of patent for tin-lined steel soda fountains. After investigation of the inventions of plaintiffs and defendant, and a comparison of their several parts each with each, no infringement found.

In Equity.

A. v. Briesen and H. L. Burnett, for plaintiffs.

F. H. Betts and E. C. Webb, for defendant.

BLATCHFORD, Justice. This suit is brought on four patents: reissue No. 8,834, granted to John Matthews, August 5, 1879, for an "improvement in soda-water fountains," on an application for reissue filed June 26, 1879, the original patent, No. 128,411, having been granted to said Matthews, June 25, 1872, for 17 years from June 13, 1872; reissue No. 8,837, granted to John Matthews, August 5, 1879, for an "improvement in soda-water apparatus," on an application for reissue filed June 26, 1879, the original patent, No. 137,702, having been granted to said Matthews, April 8, 1873; letters patent No. 159,433, granted to John Matthews, February 2, 1875, for an "improvement in vessels containing gases and liquids under pressure;" and letters patent No. 179,583, granted to John Matthews, July 4, 1876, for an "improvement in fountains for containing aerated beverages."

The specification of reissue No. 8,834, referring to the drawings which accompany it, says:

"Figure 1 is an exterior longitudinal view, and figure 2 a central longitudinal section of a fountain constructed in accordance with my improvement. My invention consists in a novel construction of a tin-lined steel fountain for soda-water and other aerated or gaseous liquids, such fountain combining lightness with strength, and being of cylindrical form and uniform dimensions, or thereabout, throughout its length, thereby adding to the convenience of packing and handling; also, being exempt from expansion or permanent lateral distention by the interior pressure to which it is subjected, thus preserving its form and contributing to its durability. Fountains for the like purpose, as previously made, have been largely expansive, and retained the set given to them by extension, and being otherwise objectionable. In the accompanying drawings, A represents a block-tin interior body of cylindrical form, with hemispherical or reduced ends, the same constituting the tin lining of the fountain, and being provided at one of its ends with a neck, *b*, for the introduction of the usual or any suitable connections by which the fountain is charged and its contents drawn off, said neck receiving or having screwed into it a screw-coupling, *c*, secured by a nut and washer, *d*, *e*, on the exterior of an outer end-cap, *B*, for making the connection. *C* is the exterior shell or body proper, made of galvanized sheet steel, as may also be the end-caps, *B*, *B*¹, which are soldered to or over the extremities of the same, and constitute, as it were, parts of said body, *C*, that surrounds or fits over the tin lining, *A*. The end-caps, *B*, *B*¹, are united to the body, *C*, without
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flanges or projections, by tin joints, as *f, f*, made by soldering with pure tin, which, being a ringing metal, unites closely with the steel exterior to make a firm and durable joint, as other solders having lead in them will not do. Bands, *g, g*, of brown paper or other non-conducting material are introduced between the tin lining, *A*, and steel body, *C*, at the ends of the latter, to prevent the tin of the lining being melted by the heat used in making the pure tin joints, *f, f*. The fountain is also filled with water for the same purpose prior to making said joints. The non-stretching character of the body, *C*, by reason of the same being of steel, insures the fountain preserving its shape, and the absence of end flanges provides for the close packing of a series of such formations when transporting or storing them."

The claims of No. 8,834, four in number, are as follows:

"(1) The combination of the inner continuous tin fountain, *A*, having neck, *b*, with the rigid inclosing shell, made in sections, substantially as herein shown and described. (2) The tin vessel, *A*, incased by a cylinder, *C*, and ends, *B, B*¹, in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified. (3) The combination of the inner vessel, *A*, with the exterior covering, made in sections, which are united after being placed around the vessel, *A*, substantially as specified, the inner vessel being entirely continuous within the covering. (4) The combination of the inner vessel, *A*, with the surrounding covering or shell, and with intermediate bands, *g, g*, of paper or non-conducting material, substantially as specified."

Claims 1, 2, and 3 are alleged to have been infringed. The text of the specification of No. 128,411 is identical with that of No. 8,834, as above quoted, except that, in No. 128,411, the word "closely" is inserted between the words "body, *C*, that" and the words "surrounds or fits." No. 128,411 had only one claim, as follows:

"The tin vessel, *A*, incased by a steel cylinder, *C*, and ends, *B, B*¹, soldered to the latter, in the manner substantially as described, as a new and improved article of manufacture, for the purpose specified."

It is contended for the defendant that No. 8,834 is void as to the first three claims, because it was applied for and granted, with expanded and generalized claims, after a delay of seven years in applying for a reissue. The descriptive parts of the two specifications are identical, except as to the word "closely." The omission of that word is not a restriction.

The novel construction of a tin-lined steel fountain, in which the invention is stated, by the original specification, to consist, is shown, by the claim of the original, to be a structure having these features: (1) A tin vessel or lining, *A*; (2) incased by a steel body or cylinder, *C*; (3) the outer end-caps or ends, *B, B*¹, soldered to the steel body or cylinder, *C*, without flanges or projections, by tin joints made by soldering with pure tin instead of by a solder having lead in it. The text of the original specification, in its descriptive part, shows that this was the invention. The claim was adequate to secure that invention. There was nothing ambiguous or obscure or deficient in the claim, to secure that invention. There was no inadvertence, accident, or mistake, and there is no attempt, by proof, to show that there was. The fact that the descriptive parts of the two specifications are alike,

shows that the sole object was to change the claim; and, as the new claims are not restrictive, they are for a different and enlarged invention, in so far as they are different claims. The first three claims omit all limitation to the method of soldering the end-caps to the cylinder or body by tin joints, which is an indispensable element of the invention set forth as the invention in the original specification, and such omission enlarged the invention and enlarges the scope of the claims. The new claims are sought to be used to cover structures which came into existence after the original patent was granted, but before application was made for the reissue, and that application was not made until seven years after the original patent was granted. During that interval, the defendant engaged in making the structures alleged to infringe. It is apparent that the plaintiff knew this and took his reissue in order to be sure and have claims which would cover the defendant's structures. They did not infringe the claim of the original patent. The sections of their outer shell were not and are not united by tin solder, nor were nor are the structures without flanges or projections. The case must be controlled by the rulings in *Miller v. Brass Co.* 104 U. S. 350; *James v. Campbell*, Id. 356; *Mathews v. Machine Co.* 105 U. S. 54; *Bantz v. Frantz*, Id. 160; *Johnson v. Railroad Co.* Id. 539; *Gage v. Herring*, 107 U. S. 640; S. C. 2 Sup. Ct. Rep. 819; *Clements v. Odorless Excavating Apparatus Co.* 109 U. S. 641; S. C. 3 Sup. Ct. Rep. 525; *McMurray v. Mallory*, 111 U. S. 97; S. C. 4 Sup. Ct. Rep. 375; *Turner & Seymour Manuf'g. Co. v. Dover Stamping Co.* Id. 319; S. C. 4 Sup. Ct. Rep. 401. The first three claims of No. 8,834 are adjudged to be invalid.

The specification of reissue No. 8,837, referring to the drawing which accompanies it, says:

"The drawing represents a vertical central section of my improved soda-water apparatus. This invention relates, first, to a new manner of forming a tight joint between the body and the cock of a soda-water fountain. * * * The invention consists, first, in forming a recess in the flange of the cock, opposite the projection of the bung, for the reception of a soft metallic or other packing. I have, previous to this invention, used an annular packing in a recess in the fountain top; but that construction renders it difficult to insert and replace the packing. It is much easier to replace it on the flange of the cock. I also find that this improvement affects a great saving of gas, which is wasted if the joint is imperfect. * * * In the accompanying drawing the letter A represents a stop-cock having a flange, *a*, and a downwardly projecting extension or lower part below said flange. C is the bung, which projects from the fountain body through an aperture in the shell or body, D, of the fountain. The flange, *a*, of the cock is directly above said bung, and is recessed at its under side to receive a soft metal or other packing, *x*. The projection, *z*, of the bung of the fountain fits up into this recess, and impinges on the packing which is contained in the recess of the flange, *a*. The packing, *x*, is prevented from spreading by the sides of the recess, and thus makes a perfect joint. * * *

There are five claims in No. 8,837. Claim 1, the only claim alleged to have been infringed, is as follows:

"(1) The combination of the cock, A, having recessed flange, α , and packing, x , in the recess, with the bung, C, and shell or body, D, of the fountain, substantially as herein shown and described."

The specification of the original patent said:

"AA is a stop-cock with a projection of pure tin into the fountain; aa is the flange of the cock; xx is a packing of soft metal or other substance; zz is the lip of the bung fountain. * * * The improvement relates, first, to a new method of closing the joint between the fountain and the stop-cock. * * * The first improvement is this: The flange, α , of the cock, which beds down on the bung surrounding the fountain, is recessed so as to form a matrix to receive a soft metallic or other packing, xx . The lip, zz , of the bung of the fountain fits up into this recess, and impinges on the packing, which is prevented from spreading by the sides of the recess, and thus makes a perfect joint. I have for some years used an annular packing in a recess in the fountain top, but that construction necessitates the removal of the fountain when the packing has to be replaced. It is much more convenient to have the packing in the flange of the stop-cock, as it is more portable than the fountain; and, if alloys are used, it is more convenient to send the stop-cock, to have them replaced, than the large fountain. I find this improvement effects a great saving in the gas usually wasted, if the joint is not very perfect. * * *

The claim of the original patent, on the above description, was this:

"(1) The combination of a soft metallic or other packing, xx , in a recess in the flange of the stop-cock, working against the lip, zz , on the bung of a soda-water fountain, as herein specified, so as to form a perfect joint between the cock and the fountain."

The description in the original patent is fully carried out in claim 1 of that patent. The packing in the recess in the flange worked against the lip, z , of the bung, which lip fits up in the recess so as to impinge on the packing, the sides of the recess preventing the packing from spreading. That is the description in the original. The description in the reissue is to the same effect. The projection, z , of the bung fits up into the recess and impinges on the packing, the sides of the recess preventing the packing from spreading. The cock, the flange, the recess, the packing, the bung, and the body of the fountain are elements alike in the two claims; but the lip, z , on the bung, which is named in claim 1 of the original, is not named in claim 1 of the reissue. It would seem to have been designed to make claim 1 of the reissue cover a structure in which the lip, z , does not fit up into the recess; but it would also seem that the combination cannot be, in the language of claim 1 of the reissue, a combination of the recess and its packing with the bung, "substantially as herein shown and described," unless the bung has a lip fitting into the recess, and in such way as to allow the sides of the recess to prevent the packing from spreading as the lip impinges on the packing. But the defense is set up that what is covered by claim 1 of the reissue was in public use and on sale in the United States for more than two years before the patentee's application for his original patent. The date of that

application was March 21, 1873. This defense is established in regard to the sale of two fountains, each containing a cock embracing the arrangement covered by claim 1, by William Gee, in the year 1870, to one Joslin; and in regard to the sale of two others, each containing a cock with the like arrangement, by Gee, in the year 1868, to one Butler. The answer sets up this defense with all the particularity necessary. It is not necessary to examine any of the other anticipations alleged.

The specification of No. 159,433, referring to the drawings accompanying it, says:

"Figures 1 and 3 are longitudinal sections, and figures 2 and 4 cross-sections, through lines, *x, x*, and *v, v*, of figures 1 and 3, respectively. The object of this invention is to make strong vessels for containing liquified gases, highly condensed or dissolved gases, which exert great pressure on the vessel. Such vessels, as heretofore constructed, are made of a single wall or shell, or of one or more single walls placed one within the other. In my invention I make the walls of the vessels lamellar, or of multiple shells united, so that each re-enforces the other. In the arts it is important to have very strong vessels, as the bursting of them occasions very serious consequences—sometimes the loss of life. In my invention the multiple walls, which are made of tough metal, such as steel, are united together by tin or other soldering metal, so that any imperfections in one plate are corrected by the other plate or plates. In the drawing I have shown different modes of accomplishing this object. Thus, in figures 3 and 4 the body of the vessel is made by taking a plate of steel, coating it with tin, and then coiling it in a volute, and, after that, sweating together the several plies. The caps or ends are made by placing several caps one within the other, and sweating them together. I unite the caps and the body, as in my patent of June 13, 1872, No. 128,411, or as described in another application filed of even date with this; or, instead of coiling the body, it may be made by placing one shell within another and sweating them together, and then putting on the caps, as above. This form is shown in figures 1 and 2. Around the bung I place a number of washers, as shown in figures 1 and 3, so as to re-enforce that part. * * * By giving the walls a lamellar form, a greater average strength is obtained for a given weight of metal, since the strain is equally distributed, so that the principle is applicable to vessels requiring lightness as well as strength. The following description will enable those skilled in the art to make and use my invention: In the drawing, A, is the body of the vessel, which is composed of two, three, or more plies, as shown at *a, a, a*, and is made by inserting one closely-fitting vessel into another, as shown in figures 1 and 2, or by coiling to form a volute, as shown in figures 3 and 4. The caps, B, B, are made of deep caps, two, three, or more in number, as shown at *b, b, b*. C is the bung-piece, with a broad flange on the inside. Between the cap and this flange are interposed a number of washers, *d, d, d*, so as to re-enforce the wall where it is weakened by openings. * * * If openings are required in the side or other part of the vessel they should be strengthened by washers, such as shown at *d, d, d*. Instead of a single coiled plate, the body may be made of several plates spirally coiled, so that one breaks joint with the other. The plates are first turned, and then put together, and afterwards sweated together, and also the seams and spaces between the plates, so as to unite all in one solid piece. The vessels formed in this manner are not only very strong, but resist the passage of gases much better than those made in the ordinary way. * * * The method of forming the cup-shaped caps, the kinds of metal to be used for the plates, and the process of preparing

them for use, being already known, and forming no part of this invention, need not be described. The following is the method of joining the seams which I use, and which is applicable to all kinds of vessels of iron and steel: I first galvanize or coat with zinc the whole of the sheet-steel intended for the jacket or shell or shells, and then, by means of a blow-pipe, melt tin upon the surface intended to form the joints. This tin alloys itself with the zinc, forming a very fusible alloy, which is carefully wiped off clean. The process is then repeated until little or no zinc is left upon those portions intended to form the joints. These parts are afterwards united by means of tin solder, and a very firm joint is formed. This process constitutes a part of my invention."

There are five claims, as follows:

"(1) The method herein described for forming strong vessels to contain gases and liquids under high pressure, consisting in coating a sheet of steel or other tough metal with tin or other soldering metal, coiling into a volute or spiral, and then sweating the parts together, substantially as set forth. (2) The method of forming caps or ends for strong vessels, consisting in sweating together a number of steel or other tough metal caps coated with a soldering metal, as set forth. (3) A lamellar vessel for containing liquids and gases under great pressure, having the several plies united by tin or soldering metal, as described. (4) A lamellar cap or end for strong vessels, composed of a number of caps united by soldering metal, as set forth. (5) The combination of the re-enforcing washers, *d*, with the end or body of the vessel, so as to re-enforce the parts weakened by apertures, as set forth."

It is very plain that the defendant's structure does not infringe any one of the first four claims of this patent. It is not a lamellar vessel, nor has it a lamellar cap or end, in the sense of this patent. Its cap or end is not made by sweating together a number of caps coated with a soldering metal. It has re-enforcing washers at the end where there is an aperture, but if claim 5 of the patent is not to be confined to re-enforcing washers applied to the end of such a lamellar vessel as the specification describes, the state of the art is shown to have been such that there was no invention in applying a re-enforcing washer to an aperture in a structure such as the defendant's, at the time Matthews made his invention. Such a washer as the defendant uses existed, substantially, before Matthews' invention, in the Gee structure, of 1870, and in analogous metal structures, such as generators, for holding liquids under pressure. Aside from this, the patent was not applied for till August 7, 1874, and the extensive use which Matthews made, from February, 1871, to February, 1872, in his regular business, of fountains with the aperture head re-enforced by washers, the washers being numbered by thousands, cannot be regarded as a use for experiment. The experiment might as well have continued till now, to see if some one washer would not give way.

The specification of No. 179,583, referring to the drawing accompanying it, says:

"Figure 1 shows a longitudinal section of my invention. The improvement consists in forming the bung for the cock or plug of the fountain in such a manner that the recess for the soft metal or other washer is obtained.

It also consists in protecting the inner face of the metal bung. In the drawing, *a* is the metallic bung; *F*, the fountain-case, or shell; *b*, nut to hold the bung in position; *c*, recess for washer; *e*, body of faucet; *d*, screw-thread stem of faucet; and *g*, the lining of the fountain. Recesses in the top of the fountain case have been long used, but may be more easily constructed by placing them in the bung, as shown, the bung being made of a separate piece of metal. The washers may also be more readily turned or tinned. The first part of the invention, therefore, consists in forming a recess, *c*, in the top of the bung, so as to hold a washer between the bung and the screw faucet stem. The second part of the invention consists in carrying the lining of the fountain over the flange of the bung, so as to protect the inner end of the bung. It is usual to carry the lining between the bung and the fountain case. This leaves the bung, which is usually of brass, exposed to the action of the beverage, which thereby becomes contaminated. By carrying the lining, *g*, over the internal face of the bung, and soldering it thereon, the bung is protected against all action from the aerated water, or other beverage, and these are not liable to become contaminated. This invention is applicable to all kinds of fountains or reservoirs in which a metallic bung is inserted with a draught faucet."

There are two claims, as follows:

"(1) A metallic bung, provided with a recess, *c*, in combination with faucet, *e*, *d*, substantially as described. (2) In a fountain, a lining carried over the inner face of a metallic bung, and soldered thereto, substantially as shown, so as to protect the bung against corrosion, as set forth."

Two experts for the defendant testify that the defendant's structure, *E*, has no washer in the bung casting, nor any recess that would receive and support such a washer, and does not contain the combination covered by claim 1, even when the cock or faucet is screwed into the bung of *E*. Nor does any expert for the plaintiffs testify that the defendant has any such washer in a recess, or any such recess for a washer. Moreover, a washer so confined in a recess in a cock, that it operated, when squeezed, to pack a joint, existed before, and it hardly amounted to a patentable invention to change the position of the recess from the cock to the bung, there being no other result than convenience.

As to claim 2 of No. 179,583, the specification is for "improvements in fountains for containing aerated beverages," and states that the invention covered by the two claims is "applicable to all kinds of fountains or reservoirs in which a metallic bung is inserted with a draught faucet." Claim 2 is for a lining carried over the inner face of a metallic bung, and soldered to it, instead of being carried outside of the bung, so as to protect such inner face against corrosion. This claim is broadly for protecting a metallic bung by a lining of any material, soldered to the inner face of such bung, so as to prevent access of the contents of the vessel to such inner face. In view of the state of the art, as proved, there was nothing new or patentable in such a claim. The arrangement was an old one in generators, to protect the bung by carrying the lead lining over the inner face of the bung, to keep the acid of the liquid from the brass of the bung. Whether the lining was soldered to the bung or not, there was no invention in mak-

ing it permanent by soldering, or by any other effective mode of attachment, in view of the state of the art of soldering.

It results, from these considerations, that, as to all the patents, the bill must be dismissed, with costs.

ADAMS & WESTLAKE MANUF'G CO. v. WILSON PACKING CO. and others.

(Circuit Court, N. D. Illinois. August 9, 1884.)

1. PATENTS FOR INVENTIONS—SOLDERING PROCESS—NOVELTY.

Patent 191,405, granted to George M. Clark and Arthur Harris, May 19, 1877, for an "improvement in soldering process," *held* void for want of novelty.

2. SAME—INFRINGEMENT—SOLDERING TOOL.

Patent No. 194,519, granted to Clark and Harris, as assignee of Arthur Harris, August 27, 1877, for an "improvement in soldering tools," *held* infringed by soldering tool used by defendant.

In Equity.

Coburn & Thacher, for complainant.

Munday, Evarts & Adcock, for defendants.

BLODGETT, J. This suit is brought to restrain the infringement of letters patent No. 191,405, granted to George M. Clark and Arthur Harris, May 19, 1877, for an "improvement in soldering processes," and letters patent No. 194,519, granted to said Harris and to said Clark, as assignee of said Harris, August 27, 1877, for an "improvement in soldering tools," both of which patents are assigned to complainant, and no question is raised as to complainant's title.

I do not understand that defendants seriously deny that they have used substantially the same process described in the first-mentioned patent, but they deny the infringement of patent No. 194,519. Patent No. 191,405 purports, as I understand and construe it, to be for a process. The inventors say in their specifications:

"Our invention relates to a new and useful process or soldering tin cans without the use of soldering irons; and consists in heating the joint to be soldered to a high temperature, as high as the tin will bear without burning or becoming discolored, and then, after applying resin, either in the powdered or liquid form, pouring into the joint molten solder. The solder flows and fills the joint on account of its being heated to a high temperature. The necessary requisite to our invention is to have the parts of the can which constitute or form the joints to be soldered, heated, so that the solder, which must also be in a liquid state, will flow in the joint and fill it. * * * We are aware that joints have been heated preparatory to soldering, and the solder laid on cold; but the purpose was to heat sufficiently to melt the solder when applied. This requires a very high temperature, which is very liable to scorch the tin, and there is great inconvenience in applying the solder cold, and relying upon its contact with the tin to melt it and heat it sufficiently, so that it will flow readily. We melt the solder separately, and only heat the joint to a sufficiently high temperature, so that the melted solder, when poured upon the joint, will at once flow and fill the joint. We avoid the great dan-

ger of scorching the tin, and, by using melted solder, are enabled to solder tin cans with great facility."

The proof in this case shows, if it were not already admitted in the specifications themselves, that devices for soldering had been patented, and perhaps otherwise publicly described, in which a wire, strip, or drop of cold solder had been laid upon the joint, and then the joint sufficiently heated, by contact with a hot table or metallic plate, to melt the solder; and it also appears that other devices had been patented—where the joint, after being heated sufficiently to secure the adhesion of the solder, was dipped into molten solder, or turned in a groove fitted to receive the flange-joint of the can, into which the melted solder had been poured—long before the invention claimed by complainant's patent. In the patent of Robert J. Hollingsworth, dated September 12, 1865, he describes a hollow metallic plate, G, with grooves fitted to the form of the can to be soldered, with a provision for heating this plate, and then describes his process, as follows:

"When the plate is sufficiently hot for use, a can previously supplied with a coil of solder wire is placed on it, so that the groove of one of its joints, B, will fit in one of the grooves, G, of the plate. So soon as the solder begins to flow, the can is to be shifted and shook a little, so as to distribute it more perfectly around the joints. It is then taken off. Each of the grooves, G, is to receive a can at the same time; and, since the operation takes very little time, a large number of cans can be soldered in a given time. The top and bottom joints are soldered in the same way. This mode of soldering the bottom and top joints preserves the side joint or seam, which is soldered on the outside, in good order, without impairing it at the joint, B, of the top and bottom of the can, as is liable to be done in the common mode of soldering the joints, B, only on the outside."

In the specifications of the patent issued June 6, 1871, to Isaac Kaylar, it is said:

"The soldering of the top and bottom of the can is effected by placing the can on the heated plate or soldering bed, G, with a small lump of drop solder inserted in the can, as represented in figure 3, when the solder will adjust itself and be caused to melt immediately over the lowest point of the grooved end of the can, so that by turning the latter once, twice, or more frequently if necessary around the plate, G, the solder will flow or be distributed all around the joint of the can, and the same thus be made tight. The general heated surface of the plate, G, prepares or warms the ends of the can before or as its edge approaches the hottest point in the plate over which the solder lies, thus expediting the soldering of the joint; and, to further expedite the process, the cans to be soldered may be preliminarily heated by arranging them on heated shelves connected with the furnace."

This inventor further says that he uses drop solder in place of ring solder arranged around a groove, because it can be done more rapidly, and save labor and trouble. In the patent issued to Jacob Gulden, dated July 16, 1872, the process shown is that of heating a metallic table having a recess or groove fitted to receive the end of the can into which melted solder is poured, the end of the can being turned thereon to take up the solder so as to close the joint. It is

unnecessary to select further illustrations from the large number of prior patents introduced in evidence to show that heating the ends of the can or joints, in order to prepare them for receiving solder, was not new with this inventor; indeed, the testimony in this case, as to the art of soldering, shows that tin, to make it unite with or take solder, must be heated to quite a high degree of temperature; and this, in the old way of doing the work, was accomplished by the soldering-iron, which, in the hands of a skillful workman, was made to heat the joint in advance of laying on the melted solder with the point of the iron.

It will be seen that the patentees in this case provide no special method for heating the joints or ends of their cans to be soldered. They do, however, as a mode of showing how their *process* can be applied, say that "they place the cans to be operated upon, upon a hot metal plate, so that the joint may become heated uniformly, and to as high a temperature as it will bear without scorching or discoloring the tin;" that they then put some resin about the joint in the ordinary manner of preparing it for solder, and then, with a ladle or similar article, pour the melted solder into the groove, and it immediately flows around and fills the heated joint, soldering the same more perfectly than it can be done with the soldering iron. It appearing sufficiently from the proof that it was old at the time these inventors entered the field to heat the joints for the purpose of making them receptive of the solder, the only element left in the complainant's patent, wherein it differs from the older devices for producing the same result, is that, instead of heating the joint to such an extent as to cause it to melt cold solder or drop solder, or solder wire placed in or around the joint, and instead of turning the heated joints in a groove filled with melted solder, these patentees pour hot solder around the heated joint; and the question arises, is this a patentable difference? My conclusion is that when the advantage of heating the joint for the purpose of making it take solder more readily, and of heating upon a metallic table, or in a gas jet, or by any of the other methods shown in the proof in this case, was once devised, there is no invention, and no calling into action of the inventive faculty in changing the process from that of turning the heated can in molten solder to that of pouring melted solder into the joint from a cup, ladle, or other article capable of holding it. It therefore seems to me that this patent must be held void for want of novelty.

As to the patent No. 194,519, for an "improvement in soldering tools," the evidence in the record shows very little use by the defendant of this device; in fact, I did not understand that the infringement of this patent was seriously insisted upon. The proof does show some slight use by the defendant of the device of a soldering tool covered by this patent, or another instrument so similar in construction and operation as to be clearly an infringement of this.

I conclude, therefore, there must be a finding under the proof that the defendants have infringed No. 194,519; and, if the matter is of consequence enough for counsel to demand a reference on the question of damages, such reference will be ordered.

THE LEPANTO.

NEDERLANDSCH AMERICAANSCH E STOOMVART MAATSCHAPPY v. THE LEPANTO and another.

(District Court, S. D. New York. August 23, 1884.)

1. COLLISION—FOG SIGNALS—ERRONEOUS LOCATION OF WHISTLE NOT A FAULT.

An error of five points in locating a vessel's position by the sound of her whistle in a fog is not necessarily a fault, under the proved aberrations in the course of sound.

2. SAME—DUTY OF VESSEL.

If the sound comes apparently from a definite direction, a steamer is justified in steering away from it; but if it seem *near*, she is also bound, at her peril, to stop and reverse at once. If she does not do so, she must, *prima facie*, answer according to the event.

3. SAME—MODERATE SPEED.

Where a steamer is properly officered and manned, and her officers and lookout are attentive and alert, and locate a whistle according to the best judgment attainable at the time, if her previous speed was moderate, and on first hearing the whistle in a definite direction, apparently near, she at once steers away from its apparent direction, and immediately stops and reverses her engines at full speed, she does all that is possible on her part to avoid collision, and is not liable; and if both vessels do the same, and a collision ensue on account of an erroneous location of the whistle by one or the other, it must be set down to inevitable accident, and the loss remains where it fell; but if either fail in these duties, and a collision ensue that would have been avoided by observing them, the fault is hers that neglected these obligations.

4. SAME—CASE STATED.

The steamer E. was going E. $\frac{1}{2}$ S., in a dense fog, near George's bank, under reduced speed of seven to seven and one-half knots; the steamer L. was going west under half speed, four and one-half knots; they heard each other's whistles about the same time, and about four minutes before collision; the E. located the L.'s whistle three to four points on her starboard bow, *i. e.*, about S. E., and at once starboarded, to go to the northward, and (probably) slowed, but did not reverse; the L. located the E.'s whistle about two points on her port bow, *i. e.*, about W. S. W., and at once ported, to go to the northward, also, and at the same time reversed full speed; when the E. had got heading N. E., and the L., W. N. W., the L. struck the E. amidships, and the E. soon sunk. *Held*, on conflicting evidence, that both were in error as to the bearing of each other's whistles; that they were about 3,100 feet apart when the whistles were first heard; that the L. was in fact about one and one-half points on the E.'s port bow, instead of three to four points on her starboard bow, and that this error was material; that the E. was about two-thirds of a point, instead of two points, on the L.'s port bow, but that this error was immaterial as respects the L.'s navigation. *Held*, that neither was in fault for mere error in locating the other, or for steering to the northward; but that the E. was in fault, both for excessive speed (seven and one-half knots) when the whistle was first heard, and also for not reversing at once, the L.'s whistle seeming *near*. *Held*, also, that the L. was nearly stopped at the collision, and would

have been fully stopped before collision, and within her share of the distance that separated the two steamers when the whistles were first heard, had the E. observed her duty; and that the L., therefore, was not to blame; that her previous speed (four and one-half knots) was "moderate;" that she violated no rule or custom of navigation; and that the whole fault of the collision was on the part of the E. in not reversing, and in her immoderate speed.

5. SAME—REDUCTION OF PRESSURE.

Some reduction of steam pressure being usual and apparently necessary, for mechanical reasons, when going at reduced speed, *held*, in the absence of proof, that the reduction of steam pressure on the L. from 75 pounds to 60 pounds was not excessive; that no fault of the L. in this respect was shown, since it appeared affirmatively that the L. had all necessary power in reserve to perform her duty by coming to a full stop within less than her share of the distance from the E. after the whistles were heard.

6. SAME—ARTICLE 19, NEW RULES—NOTICE.

Article 19 of the new regulations, (1880,) providing for notice by one or two short blasts of the whistle to indicate a port or a starboard helm, is expressly made optional. Failure to indicate or to reply at sea being no breach of the rule, or of any proved custom, *held*, not a fault.

In Admiralty.

The libel in this case was filed by the owners of the Dutch steam-ship Edam, against the British steam-ship Lepanto, *in rem*, and against her master, *in personam*, to recover \$450,000, the alleged value of the Edam and her cargo, which were sunk by a collision with the Lepanto during a dense fog off George's bank, at about 10 P. M. on the night of September 21, 1882.

The Edam was an iron steam-ship, and one of the libelants' line of packets engaged in the transportation of freight and passengers between New York and Holland. She was of 2,276 tons register, 320 feet long, 39 feet beam, and 32 feet deep. She left New York, bound for Rotterdam, in the forenoon of September 20th, with a full cargo of merchandise, 54 men, officers and crew, and 21 passengers. The Lepanto was an iron steamer carrying freight only. She was of 1,800 tons register, 305 feet long, 36 feet wide, and 26 feet deep. She sailed from Hull, bound for New York, on September 5th, with a medium cargo, and 34 men, officers, and crew. At the time of the collision she was drawing about 20 feet of water, and had about 9 feet free-board.

On the evening of the 21st the wind was light from the S. W., and the sea smooth, with a moderate roll. Each steamer had taken meridian observations at the previous noon, and corrected the ship's clock for local time accordingly. Their difference in longitude was then about 14 minutes of time, which nearly agrees with the difference of their clocks as to the time of the collision. Until the first whistle of the Lepanto was heard, a few minutes preceding the collision, the Edam had been sailing E. $\frac{1}{2}$ S. by compass; the Lepanto, due W. by compass. The log of the Edam, which was put in evidence after the principal argument of the cause, was made up on the 24th, on the arrival of the Lepanto in New York, and gives the following narrative:

"From 8 o'clock, light breeze from the west, mostly still, with intermitting fog showers; clear over head; sea, calm. Steered E. $\frac{1}{2}$ S., (by compass.) At 9 p. m., thick with fog; steamed with moderated speed, and blew the steam-whistle as is required. At 9:50 *answered* another steam-whistle bearing about 3 to 4 points on starboard bow; put the helm immediately hard a-starboard, and blew two short blasts on the steam-whistle. Shortly thereafter we heard again a steam-whistle, almost abeam on starboard side. The outlook reported *then* a green light on starboard side. *Believing that all was clear, we steadied* the helm and were then heading N. E. by E. per compass. But immediately thereafter we saw a steam-ship bear right down on us. Put the helm immediately again hard a-starboard, and blew again two blasts on the steam-whistle. The vessel was, however, so near by that collision was unavoidable. We could do nothing better than to let the ship run on in the hope that she should pass astern of us. But she ran into us abreast of the engine-room. Ordered immediately the engine to stop; but this order remained unanswered, because nobody could get any more to the starting gear, by reason of the damage and the inpouring water. The vessel went into us through the starboard side deck-house up to the ventilator, got thereafter clear again, and ran a second time into us, abreast of the main rigging, went through the starboard side, demolished bulwark davit, and took part of the main rigging away. Hit us thereafter another time, abreast of the vestibule, whereby one of the boats with davits and bulwarks was demolished; ran thereafter astern of us. Our ship was heading then N. E., (by compass,) and made yet some headway. Right thereupon the engine stopped, and the ship began to sink fast. Noticed that the engine-room ran full of water. Had meanwhile closed the tunnel door. We put out, as soon as possible, boats Nos. 1, 2, and 4, awaked the passengers, and let them go with the crew, as soon as possible, into the boats. By this time there was already water in the saloon. * * * One of the boats of the steam-ship, which later proved to be the Lepanto, of the Hull line, came along-side, wherein five persons were placed yet. Went together to the Lepanto, where we, passengers and crew, mustered as best we could, with the doleful result that the third engineer, Nicolas Laijendecker, and assistant engineer, Jan Van Geijt, were lost. * * * Signed by J. H. TAAT (captain) and J. A. LAAOKROY, (first officer.)

The testimony showed that the first officer was on the bridge in actual charge of the navigation of the Edam. The third officer was also on the bridge, and the captain a part of the time on the bridge and a part of the time on the deck, with another lookout properly stationed, and other seamen also on deck. Their testimony in general sustains the narrative of the log, though with some important differences. The interval between the first whistle and the collision is estimated by the officers at 2 $\frac{1}{2}$ to 3 minutes; the lookout estimates it at 6; but no time was taken by the clock. Only two whistles from the Lepanto were heard, estimated to be about two minutes apart. The first officer estimated the time during which the helm was steadied to be about half a minute; and the time from the second order to starboard to the collision about the same. In the libel and in the testimony it is stated, though not stated in the log, that when the first whistle was heard the engines were ordered to "slow." No other order to the engineer was given. The lookout testified that the green light was seen and reported by him after the second whistle was

heard, in accordance with the statement of the log. The officers testify that it was reported, and seen by them, as a momentary flash, some five or six seconds after the first whistle was heard, and just after the first order to starboard was given. The green light was not referred to in the original libel, or first amended libel, but is mentioned only in the second amended libel.

The log of the Lepanto is as follows:

"Sept. 21, 1882, 8 P. M., steering west by pole compass. Calm, fine, clear weather; smooth water. 9 P. M., light S. W. airs; the weather became foggy; warned chief engineer that if fog continued should go slow, and to ease steam down at once; also began to blow steam-whistle at intervals of two minutes. 9:30, fog lifted a little. 10 P. M., thick fog; half speed the engines. 10:10 P. M., heard a whistle *close to our port bows*; stopped engines, helm hard a-port, and full speed astern. 10:12 P. M., heard a whistle and saw a mast-head light very close, bearing W. S. W., and at same time made it to be a vessel crossing our bows from south to north. 10:15 P. M., came into collision with a steamer (our head at the time being W. N. W.) which never stopped crossing, but dragged right across our bows, at the same time swinging to the westward, her propeller going all the time. 10:17 P. M., after getting clear of the steamer stopped engines, sounded the compartments, soundings being F. 4, M. 5, aft 3, making no water. Immediately sent away a boat in charge of second officer to her assistance, that at 10:30; got out three other boats, sending away two more, with all our crew and officers, to render assistance, (making three boats in all.) 10:35 P. M., saw the steamer again on our port side, abeam, close to; slow ahead engines, and headed our ship to N. E. and stopped. 11:30 P. M., the boats of the Edam (three in all) arrived along-side with the passengers and crew, who were at once embarked. 11:40 P. M., one of our own boats returned, bringing the chief officer of the Edam, a quartermaster, the steward, and two passengers. 11:45, all our boats returned. * * * On examination of the forward compartment next the stem, discovered a large aperture, the stem twisted over the starboard and broken, also bow-plates stove in. * * *

This account is confirmed by some five or six of the Lepanto's witnesses. The master, Capt. Rogers, was on the bridge, in charge of the navigation, and the second officer, as lookout, was on the top of the pilot-house, with another lookout forward. The chief engineer, with an assistant, was on duty in the engine-room. The master handled the lanyard of the whistle, and took the times stated from a clock near by. The time of the collision, 10:15, however, was taken, as he testified, not at the moment of collision, but "from half a minute to a minute after the vessels had cleared." Only two whistles from the Edam were heard, both long blasts. All the Lepanto's witnesses testified that the Edam's first whistle bore about two points off their port bow; several of them say that the second whistle was about two minutes subsequent, and that the collision was about two minutes after the second whistle. The master and others testify that the Edam's mast-head light was not seen at the same instant that the second whistle was heard, as would be inferred from the log, but from a half minute to a minute later. The engineer and his assistant testified that the orders to stop, and to reverse, came together at 10:10.

and were immediately obeyed; that it took about one minute to get the engine started on the reverse; that the reverse movement works slow at first, gradually increasing for about a minute and a half, when the engine gets full speed astern; and that he estimated two minutes' full speed astern to be sufficient to stop all forward motion of the ship when going, as she had been, at the rate of $4\frac{1}{2}$ knots. He further testified that at 9 p. m., under the captain's orders, the steam pressure was reduced from 75 pounds to 60, bringing down her previous full speed of 9 knots to 8 knots per hour; that at 10 p. m. she was put at half speed, making from 4 to $4\frac{1}{2}$ knots per hour.

The Edam's full speed was from $10\frac{1}{2}$ to 11 knots. At 9:30 her steam pressure was ordered to be eased, her revolutions were brought down from 58 to 37 per minute, and her speed reduced to $7\frac{1}{2}$ knots, according to the chief engineer, or 7 knots, according to the master's estimate. Both sides testified that the fog was dense and wet low down towards the water, while the stars remained visible overhead; and that prior to 9:30 the fog alternated in rarer and denser drifts. Capt. Rogers testified that considerable echo accompanied the whistles.

Philip J. Joachimson and F. A. Wilcox, for libelants.

Foster & Thomson, for defendants.

Brown, J. The basis of actions of this character is some fault in the vessel or person sued. Fault consists in the violation of some statutory rule of navigation, or in the failure to exercise due nautical skill or prudence. The burden of proof is upon the libelants. To entitle them to recover they must point out the fault complained of, and establish it by a fair preponderance of evidence. The faults urged against the Lepanto in this case are (1) immoderate speed; (2) that, being south of the line of the Edam's course, she unjustifiably ported her helm and crossed the Edam's bows; (3) delay in reversing her engines; (4) failure to give notice of her porting by one sharp blast of the whistle; (5) her previous reduction of steam pressure; (6) too long intervals between her whistles.

The evidence on both sides shows that the whistles were given and heard at intervals not exceeding two minutes. This is all that is required by the rules, and no fault in that regard is proved. Article 19 of the new international rules, (4 Prob. Div. 244,) to which both these vessels were subject, providing for notice by short blasts of the steam-whistle to indicate the porting or the starboarding of the helm, is expressly made optional. If such a notice from one steamer is heard by another, still no obligation to answer it is imposed by the rule. Nor was any evidence introduced to show that any custom to give such notices has become established, so as to render conformity to such a custom obligatory. In the absence of such an established usage it is impossible for the court to hold the giving of such notices obligatory, because that would contradict the clause of the statute rule that makes it optional. The other faults charged turn mainly upon the question of the relative positions of the two steamers, and

this has been the point chiefly controverted. The testimony, aside from what relates to this point, does not present any serious conflict. The differences are comparatively small, not greater than are to be expected under circumstances so unfavorable to exact observation and accurate recollection; and they are capable of easy explanation. But, as respects the relative position of the vessels, the testimony is in direct contradiction. There is no question that the Edam was previously sailing E. $\frac{1}{2}$ S.; the Lepanto, due west. Each contends that the other was to the southward of its own course,—the Edam insisting that the Lepanto was three or four points on her starboard bow, *i. e.*, bearing about S. W., and the Lepanto insisting that the Edam was about two points on her port bow, *i. e.*, bearing about W. S. W. Each accordingly, when the other's whistle was first heard, at once put its helm hard over, and steered to the northward, so as to give the other a wider berth. By so doing they brought about the collision which each sought to avoid. Had either or both kept her original course the collision would not have happened.

First. From the testimony I find no reason to doubt that both vessels were officered and manned by competent persons; that the officers and lookout were properly stationed, attentive, and alert; and that each vessel located the other according to the best observation and judgment attainable at the time. Each acted upon this judgment in the way most prudent and natural, by steering away from the apparent source of danger, in order to give the other as wide an offing as possible. Nevertheless, a great mistake was made by one or both of the vessels in locating the other; and this mistake was the original and prime cause of the collision. Erroneously locating a vessel by the sound of her whistle in a fog is not, however, necessarily a fault. Sound, like light, is liable to be deflected from its original course by reflection, refraction, or diffraction. When this happens, though the hearer locate correctly the direction of the sound as it comes to his ear, the source of the sound will be in a different quarter. Elaborate experiments on fog signals in this country and in England have established, beyond question, apparent anomalies and contradictions in the transmission of sound through the atmosphere, and a consequent liability to error as to the quarter in which the sound originates. Although opinions differ as to the comparative importance of the different agencies that produce these anomalies, all the observers agree substantially upon the fact of great aberrations in the course of sound and in the audibility of fog signals. It is now well settled that these aberrations are not due to fog, snow, rain, or hail, which produce little if any sensible effect on the transmission of sound. So far as known, these anomalies arise from the effects of winds, air currents, and a non-homogeneous atmosphere. See Appendix to Reports of American Light-house Board for 1874, 1875, 1877, by Prof. Henry; Appendix to Light-house Report of

1879, by Prof. Morton; Henry on Sound; Tyndall on Sound, (3d Ed.) pp. 9, 310, 351, 432; Prof. Taylor's "Recent Researches in Sound," Amer. J. of Sci. & Arts, January and February, 1876; Prof. Reynolds "On Refraction of Sound by the Atmosphere," L. E. D. Phil. Mag. July, 1875; Appleton's Annual Cyclop. for 1883, art., "Sound Signals," by A. B. Johnson, chief clerk of the Light-house Board.

While the experiments above referred to relate chiefly to the penetration of sounds and to variations in audibility, to aerial echoes, and to the observed alternate areas of sound and silence, they also embrace the deflection of sounds by reflection or refraction, as one of the modes in which the observed aberrations arise. It is now well established that areas of inaudibility may exist distant a quarter of a mile only in front of the blasts of the most powerful steam siren; while farther off in the same direction the sound may again become audible and loud, and remain so for miles beyond. Prof. Henry, in his report of 1877, (page 71,) shows that this may arise from an opposing wind, which refracts the sound waves upwards over the head of the listener, till they meet a different current, or strata of less velocity, when they may be deflected to the earth again; or it "may be considered as due to a sound shadow produced by refraction, which is gradually closed in at a distance by the *lateral spread of the sound wave* near the earth; or by the probable circumstance of the lower sheet of sound beams being actually refracted *into a serpentine or undulating course*. Such a serpentine course would result from successive layers of unequal velocity in an opposing wind." Appleton's Amer. Cyclop. 1883, p. 725. These phenomena, he adds, are observed especially in fog when the wind is ahead, (page 65.) Such, as it will subsequently appear, was the situation of the Edam in respect to the Lepanto's whistles. As the steam-whistle has no definite axis, such as the trumpet of the siren has, its lateral sound waves would naturally "close in" around areas of silence much nearer than those of the siren would do; and its aerial echoes, also, would come from a wider arc of the horizon. "In the experiments at South Foreland," says Prof. Tyndall, (Sound, 318,) "not only was it proved that the acoustic clouds stopped the (direct transmission of) sound, but in a proper position the *sounds which had been refused transmission were received by reflection*." Gen. Duane says that "a difficulty is sometimes experienced in determining the position of the signal by the direction from which the sound appears to proceed, *the apparent and true direction being entirely different*." Report of 1874, p. 104. He ascribes this result "to the refraction of sound passing through *media of different density*." Prof. Henry and Prof. Taylor find a more efficient cause in unequal velocities of the wind, which produce a deflection in the sound waves, and thereby change the direction of their progress. Mr. Johnson writes that "he has frequently been more than five points out of the way when trying to locate the direction of the sound made by a given fog signal." "I have even heard," he says,

"apparently the sound overhead, when it was from five to seven miles away. It has been my habit to correct the observation of audition by looking at the compass, and to utterly distrust the ear as a means of determining the exact or even general direction of sound on the water."

When the sound waves reach the ear by any indirect course, whatever be the particular cause of deflection, the mariner in a fog is necessarily misled as to the true direction of the vessel from which they proceed, since he has no means of ascertaining or correcting the deflection, or even of knowing of its existence. In the recent case of *The Zadok*, 9 Prob. Div. 114, as well as in *The Elysia*, 4 Marit. Law Cas. 540, it was held that "failure to hear a fog-signal at a distance it might be expected to be heard, cannot be accepted as proof of negligence on the part of those who did not hear it." *The Negaunee*, 20 FED. REP. 918. Similarly, it must be held, upon facts so abundantly established as those above referred to, that where, as in this case, the officers are competent, properly stationed, and alert, and have apparently formed the best judgment attainable at the time, mere error in locating another vessel's actual position by the apparent direction of her whistle, though the error be as much as five points, is not proof of fault; and, accordingly, I hold neither of these vessels chargeable with fault merely for its error in locating the other.

This liability to error is, however, well known to mariners. It was testified to on the trial. But while this fact excuses mere error in location, if the observations made be as correct as possible, it widens the obligations of prudence and caution. Knowing this liability to error, the mariner is bound to recognize the fact that there is still actual danger of collision, and that, though steering away from the apparent direction of the whistle that he has heard, he may, like one of the vessels in this case, be steering directly towards it. Under rule 18, therefore, he is bound to "slacken speed" to the lowest point compatible with the proper handling of his vessel; and, "if necessary, stop and reverse," until all doubt be resolved and all danger passed. For the libelants it is urged that by reason of this liability to error as to the position of the *Edam*, the *Lepanto* was in fault for changing her helm at all; and that, though she stopped and reversed her engines at once, she was bound to keep a steady helm until the course and position of the *Edam* were known with certainty. *The Louisiana*, 2 Ben. 371. In my opinion this rule can be justly applied only where the sound itself is so diffused as to be indeterminate in its direction, so that there is no good reason for going one way rather than the other. Where the sound comes apparently from a precise direction, to steer away from it furnishes, as a rule, the most probable means of escape. Great mistake by the deflection of the sound, though occasional, is comparatively infrequent; and steering away from the sound ordinarily gives, at least, the longest path, and

the most time in which to stop before reaching the other vessel. It is, therefore, the most prudent course; and, when accompanied by the order to stop and reverse at full speed, it ought not to be held a fault. If this charge of fault were well founded, it would come with ill grace from the *Edam*, which changed her helm without reversing; but the concurrence of both masters in the same maneuver is evidence rather of the judgment of experienced commanders that such was the most proper and prudent course to adopt.

Just at what point a steamer in a fog, on hearing another's whistle, is bound to stop and reverse; or how the master is to know when that is "necessary" under the rule, is, to some extent, doubtless, a question of practical judgment. A steamer is not bound to stop and reverse at once, without reference to how distant the whistle may be, or may appear to be. Where the whistle is certainly distant, and no danger can be incurred by delay, immediate stopping is certainly not necessary; but if it be *near*, or appear to be near, she is bound, at her peril, to do so. *The Frankland*, L. R. 4 P. C. 529, 534; *The Kirby Hall*, 8 Prob. Div. 71; if uncertain, she must slacken, or stop and reverse. *The George D. Fisher*, 21 How. 1, 6; *Peck v. Sanderson*, 17 How. 178, 181. For her conduct in this respect, a vessel must, *prima facie*, be held to answer according to the event. It is always safe to stop and reverse; at least, as regards the charge of fault. If she does not stop and reverse, when it is shown by the event that by doing so the collision might have been avoided, she must establish a clear justification for her course or be condemned. *The Khedive and The Voorwards, etc.*, 5 App. Cas. 876, 890, 908. "The rules are applicable from the time the necessity for precaution begins, and continue so long as the means and opportunity to avoid danger remain." *New York, etc., v. Rumball*, 21 How. 372, 384. The whistles, or horns with mechanical appliances, required by the new regulations, (article 12,) are designed to make it certain that the signals shall be heard at a sufficient distance to render it possible in all cases for steamers to be stopped before coming in collision, if both vessels observe the rules, and have been previously going at "moderate speed;" and no steamer's speed can be held "moderate" that does not admit of her coming to a full stop within her share of the distance that separates her from another, after the latter's whistle is audible. But if a steamer is previously going at "moderate speed," and if she sails away from the apparent direction of the whistle as soon as it could be heard, and at the same time reverses at full speed, it is clear that she does all in her power to avoid collision, and no charge of fault in these respects can be sustained. *Peck v. Sanderson*, 17 How. 178, 181; *The Rhondda*, 8 App. Cas. 549, 556, 558; *The Sylph*, 4 Blatchf. 24. If both vessels do the same, in my judgment, no collision could arise under the existing rules; but if a collision should happen under such circumstances, all the rules being observed, it must be deemed to have arisen from unavoidable natu-

ral causes, without the fault of either,—i. e., by inevitable accident, —and the loss remains where it fell. *Stainback v. Rae*, 14 How. 532.

Unless the Lepanto's evidence is in some way discredited, it must be held that she complied with all these requirements. Capt. Rogers on cross-examination, testified that the first whistle heard seemed *near*; and in answer to what he meant by "near," he said: "Well, less than a mile." In fact, the vessels, as will appear hereafter, were probably about 3,100 feet apart. The Lepanto's log says: "Heard a whistle close to our port bows." Capt. Rogers accordingly ported, and reversed full speed at once. The Edam did not reverse at all; and her previous speed was confessedly about seven or seven and one-half knots. This rate of speed has been repeatedly held not "moderate" for such steamers under similar circumstances. *The Pennsylvania*, 19 Wall. 125; *The Colorado*, 91 U. S. 692; and see citations in *Clare v. Providence, etc.*, 20 FED. REP. 536. The Edam, as I have above said, was also bound, at her own peril, to reverse at once; for, by her own testimony, the first whistle heard seemed *near*. Capt. Taat testifies that at the time of the first whistle he formed the opinion that the Lepanto "was very close by." "I knew she was very close by, and I had to give way." In both these most important points the Edam was, therefore, in evident fault; so that, in this aspect of the case, if four and one-half knots be held a moderate speed for the Lepanto, without determining whether she was right or was wrong in locating the Edam, she must be held to have done all that was possible on her part to avoid the collision, provided her evidence is to be believed; while the Edam clearly did not do either what she might have done, or what the rules of navigation required of her. In effect, the Edam, while violating the rules, ran upon the Lepanto, while the latter was strictly observing them.

I find no warrant in the testimony for questioning the veracity of the Lepanto's witnesses as to what was done on board that vessel. Her log confirms them on all material points. The temptations to distort or falsify the truth in this class of cases are doubtless such as to demand careful scrutiny of the testimony; but where the testimony is found, as here, at all points consistent with itself and with the results; when it is natural and probable under the circumstances, and accords with the requirements of prudence and of the rules of navigation, and is neither impeached nor directly contradicted,—it must be accepted as the truth. See *The Khedive* and *The Rhondda*, *ut supra*. The only substantial contradiction in the evidence is as to the relative position of the two vessels. But this difference is apparent rather than real; as I have no doubt each heard the sound of the other's whistle in the direction assigned to it. From the scientific point of view, according to the experiments above referred to, an error in locating sound is more likely to arise when the sound is moving against the wind; i. e., when those hearing it are to windward, which

was the situation of the Edam here. But disregarding this theory, and considering the error of one or the other vessel as having arisen from some wholly unknown and unavoidable natural cause, the error would be as likely, *prima facie*, to have arisen on the one side as on the other; so that if there were no means of determining on which side the error arose, the Lepanto would be held without fault, on the ground that in her navigation, as above stated, she had, in any event, done all that was incumbent upon her. It must be observed, however, that if the Lepanto were actually in the direction assigned her by the libelants, her log, and her testimony as to her previous speed of only $4\frac{1}{2}$ knots, and as to the immediate reversal of her engines, and her slow motion at the time of the collision, must all be deemed false and fabricated; for from that direction, viz., S. E. of the Edam, at whatever distance she might have been, she could not possibly have reached the point of collision except by traversing a longer path and hence by going at a higher rate of speed, than that of the Edam; and the latter was going at least seven knots, and did not reverse at all. If, however, the error in location were on the part of the Edam, no such incongruity in the testimony as regards the management of either vessel, or in other respects, save as to the green light, (of which hereafter,) would arise, but the testimony of both as to their navigation would become harmonious and consistent. The error, as I have said, being as likely to arise on one side as the other, if scientific hypotheses be disregarded, the ordinary duty of the court so to decide as to harmonize all the testimony, if possible, would, therefore, require the error to be assigned to the Edam rather than to the Lepanto, if it could not otherwise be determined with certainty on which side the error lay.

Second. Disregarding, however, the direct testimony on both sides as to the bearing, or the apparent bearing, of the two vessels from each other, as inferred from the sound of their whistles, the other evidence does afford the means of tracing the course and position of each vessel backwards from the point of collision with an approximation to accuracy sufficient for all the purposes of this case. These means are: The previous courses of each; their rate of speed; the interval between the first whistles and the collision; their headings when they struck; and the rate of change of course under a helm hard over. A drawing of these positions and courses, such as I have annexed, prepared according to all that is most credible and accurate in the testimony on both sides, will answer almost all the questions which arise in the case. It reconciles nearly all the testimony, and at the same time renders it certain that a considerable error arose on each side. The larger and more important error, however, is shown to have been on the part of the Edam, the Lepanto being at the time of the first whistle about one and a half points on the Edam's port bow, instead of three and a half points on her starboard bow; and the Edam being about two-thirds of a point, instead of two points,

on the Lepanto's port bow. The error on the part of the Edam was, therefore, a very material one, since it placed the Lepanto on the wrong bow. The error of the Lepanto was immaterial, because the Edam was rightly located on the port bow, and the error in amount could not have made any difference in the Lepanto's navigation or in her duty.

A few observations on the several *data* upon which the drawing is made, will state what I regard as directly established by the evidence; and the most probable estimates, where literal exactness is not attainable.

1. *The previous courses.* As to these there is no question. The Edam was sailing E. $\frac{1}{2}$ S.; the Lepanto, due west.

2. *Heading at collision.* This is given with precision by the officers of each vessel; the Edam headed N. E., the Lepanto, W. N. W. Both, indeed, say the blow was very nearly at right angles; and each, to make this out, states the other vessel to have been heading two points more to the northward. But it is evident that at night, and in a dense fog, neither had the means or the opportunity for taking an exact observation of the angle of the other's course with its own, while they did have the means, by their compasses, of taking an exact observation of their own courses. The officers have testified to these courses positively, and their statements of the headings at the time must, therefore, be accepted, instead of mere estimates of the lateral angle of the blow. The Edam consequently changed $4\frac{1}{2}$ points in the interval; the Lepanto, 2 points. Before clearing, the Lepanto doubtless swung to the north-west or beyond. At the time of collision the Edam was under considerable headway; she cleared the first incision by "dragging past;" and as the Lepanto, 20 minutes later, was heading N. E.,—a change of 10 points, though her engines were at rest nearly all of that time,—it is evident that the collision gave the Lepanto's bows a strong swing to the northward; and it is probable that she was heading at right angles with the Edam, i. e., N. W., or even northward of that, before she cleared the first contact. This would give the right angle that both sides testify to.

3. *The interval between the first whistles heard and the collision.* This was substantially the same on each vessel; for the log of the Edam shows that she "answered" the Lepanto's whistle. This means, necessarily, the proper long blast required by the rules; not the two short blasts mentioned afterwards, as a signal of starboarding, that were not heard. The Edam's witnesses made no observations of the clock. The officers estimate the whole interval at two and a half to three minutes; the lookout at six minutes. The first officer finally said: "Two and one-half and two and one-quarter minutes is all guess-work; that is why I can't give you an answer, [as to the interval.] I didn't use any watch." Capt. Rogers, of the Lepanto, noted by the clock the times of the first and second whistles, and of the collision, as stated in the log; viz., 10:10, 10:12, and 10:15, respect-

ively. In his testimony he frequently speaks of the whole interval as five minutes; but he finally explains that he did not take the time of the collision until "half a minute or a minute after the vessels had cleared." It must have been at least a half minute after the Lepanto first struck before she cleared and got past the Edam, and it was probably more; and an additional half minute after she cleared would make a minute after the first blow. It is scarcely credible that while the two ships were afoul, or not yet out of danger, the Edam dragging past, and the Lepanto twice again running against her, the captain should turn aside, in such moments of extreme peril, to look at the clock. After they had well cleared, it is credible and probable enough that he should do so. There is good reason, therefore, for accepting his testimony on this point in explanation, and as a slight variation from the log. The chief engineer gives the same account of his taking the time at 10:15, "about a minute after the collision." The interval between the first whistles and the collision must, therefore, be taken to have been about four minutes.

4. *The speed.* The Lepanto's previous speed was "from four to four and one-half knots." I adopt four and one-half. The Edam's previous speed was seven to eight knots, according to the engineer. I adopt seven and one-half. I cannot consider the mere estimate of Capt. Taat from the deck, upon a densely foggy night, at "seven knots or a little less," as entitled to preference over the engineer's testimony. The Lepanto's engines were reversed as soon as practicable. It took one minute for the engine to commence backing; a minute and a half more to get working full speed astern; and this left another minute and a half for work at full speed astern. All her witnesses, including one, a cattle-man, who is disinterested, say the Lepanto's forward motion was nearly stopped; the captain says the propeller's backwater was abreast of him; the chief engineer says that two minutes, after the engine was working full speed astern, would stop her; *i. e.*, an additional half minute. Counsel for the libelants argues that in five minutes, if reversed, she would have been going astern. I have no doubt the Lepanto was going at not above the rate of one knot at the time of the collision; her rate was probably less; I adopt one knot at that time. This was sufficient to accomplish the injury. Her average speed for the four minutes is, therefore, taken at two and three-fourths knots, and the distance run would be 1,100 feet.

The Edam's officers all say the order to "slow" was given when the first whistle was heard. The engineer in charge being killed, I assume that the order, if given, was obeyed. But the failure of the log to mention so important a circumstance in her own justification as the slowing of the engine, especially when the log shows that the officers' attention was directed to that subject by its mention just before that she was steaming "with moderated speed," necessarily subjects this testimony to suspicion. This suspicion is increased by the subsequent language of the log as to what took place when the

Lepanto was seen: "We could do nothing better than to *let the ship run on*, in the hope that she (the Lepanto) should pass astern of us;" and also by the testimony of the officers of the Lepanto, that the Edam's propeller, when she was nearly abreast of them, was heard working very fast. Nevertheless, I am so indisposed to accept the alternative of a willful fabrication of evidence, that I adopt the testimony of the Edam's officers, that the order to slow was given, and consequently obeyed, because the order was a probable and natural one in itself; there is nothing positively contradicting it; and particularly, also, because, if the speed had not been slowed below seven and one-half knots, the Edam, in the interval of four minutes, would have run 3,000 feet, and would have changed her heading more than four and one-half points, as will appear below. The engine working slow would bring the Edam's speed, says Capt. Taat, from zero to two and one-half or three knots. She had an excess of speed, therefore, over the engine's slow rate of about four and one-half knots. If the Lepanto, with engines working astern for three minutes, and for half of that time at full speed astern, would reduce her speed from four and one-half knots to one knot, or even to half a knot only, the Edam, with her engine going at slow speed ahead and no reversal, could not have reduced her speed in the same time from seven and one-half knots to less than four and one-half knots. On slowing, her reduction at first would be at a little more rapid rate than later, and her average speed is therefore taken at five and three-fourths knots instead of six, the mathematical mean; and the distance run by her in the interval of four minutes would be 2,300 feet. A wholly independent mode of computation gives nearly the same result, viz., by—

5. *The rate of change of course under a helm hard over.* Capt. Taat, though testifying with reluctance on this subject, had some very definite knowledge concerning it. He had often observed such vessels on "trial trips" make circles with the helm hard over, and he says the time was from 10 to 12 minutes. Page 244. His own ship he had observed sometimes make 30 deg. change in a minute, and sometimes, at the same rate, (of speed,) 40 deg. per minute. Page 224. He is evidently speaking of the time occupied and the change when going at full speed, which, for the Edam, was, say, $10\frac{1}{2}$ knots. When the speed is slow, as the testimony shows, the rate of curvature will be less; i. e., the circle made will be larger. The two statements given by Capt. Taat well agree: 30 deg. in one minute equals a circle in twelve minutes; 40 deg. in one minute ("at same speed") equals a circle in nine minutes, or a variation from nine to twelve minutes. The reason of the difference the captain does not explain; possibly, the highest rate was when the Edam was light loaded. A circle in 10 minutes, or 36 deg. per minute, is equal, at ordinary full speed of, say, $10\frac{1}{2}$ knots, to a change of one point in 328 feet; a circle in nine minutes, or 40 deg. per minute, equals one point in 295 feet; a circle in twelve minutes, or 30 deg. per minute, equals a point

in 394 feet. As the Edam, on this trip, was "very deeply loaded," and, after the first whistle, was running much below her full speed, her rate of change, under her starboard helm, cannot be taken to have been greater than the least rate stated; *i. e.*, a point in 394 feet. It was probably even a little less. That would give for a change of four and one-half points (*i. e.*, from E. $\frac{1}{2}$ S. to N. E.) a distance of 1,773 feet. But to this must be added a period of at least one-third of a minute in which to give, receive, and execute the order to starboard, and to bring the vessel under its effect, during which time she would move on her former course 250 feet; and the same delay would occur under each subsequent order to change the helm. And there must also be added a half minute's forward motion of the ship for the time during which the helm was steadied. This, according to her rate at that time, would give some 250 feet more. These distances, together amount to 2,273 feet, which is very near the preceding independent estimate.

The Lepanto, at the same rate of change, *viz.*, a point in 394 feet, would change two points in 788 feet; to which, if one-third of a minute's direct progress be added, *viz.*, 150 feet, before the order could be executed and the helm felt, we should have 938 feet altogether. This is 162 feet less than the preceding computation; but as her average rate of speed was very low, not over two and three-fourths knots, and the action of the propeller was reversed, both which circumstances would, according to the testimony, enlarge the circle of her path, some such difference is not only accounted for, but must have existed.

These two independent modes of computation agree so nearly that they confirm each other, and I cannot doubt the result to be approximately correct. This result confirms, also, the testimony of the Edam's officers that her engines were slowed; for, if not slowed, her rate of speed during the whole interval must have been about seven and one-half knots; and this speed for the three minutes and a little over, during which she was actually under the effect of a hard-a-starboard helm, would have given a path of about 2,350 feet, in making which she would have varied, at the rate above given, about six points, and gone nearly to N. N. E. instead of to N. E. only. It confirms also the Lepanto's story by showing its consistency; for her heading W. N. W. at the collision, or a change of but two points under her hard-a-port helm, could only have been effected by a short distance traversed, (or else by great delay in porting, which would be improbable, considering that the Edam's whistle was heard, apparently, only two points to port,) and hence by a low rate of speed, during the interval of four minutes; and the low speed sworn to agrees with the statement of her heading W. N. W. The same considerations show, also, that an interval of only two and a half minutes between the first whistle and the collision, as contended for by the libelants' counsel, is not only extremely improbable, but altogether

inconsistent with the libelants' other testimony; for, allowing one-third of a minute's delay before the Edam would feel her starboard helm, and one-third of a minute only for steadying the helm, we should have but one and five-sixths minutes in which to change four and one-half points. Now, the highest rate of change, under any circumstances known to Capt. Taat, was 40 deg. a minute, equal (at ordinary full speed) to one point in 295 feet; and that rate of change would require a distance of nearly 1,400 feet for a change of four and one-half points; and to traverse this distance in one and five-sixths minutes would necessitate a continuous speed of over seven and one-half knots, without any slowing at all; and the whole path traversed by the Edam in the interval, on that hypothesis, would be about 1,900 feet. If, on the other hand, she were supposed to be slowing from a previous speed of seven and one-half knots, she would, at the end of two and one-half minutes, have traveled about 1,550 feet only; and deducting for delay in getting her helm to starboard and for her steadied helm, she would have had only a distance of 1,100 feet in which to change four and one-half points, equal to one point in 244 feet, or a change of over 48 deg. per minute at full speed, or a circle in seven and one-half minutes,—a rate of change far above anything hinted at in the testimony of Capt. Taat. The libelants cannot have the benefit of contradictory conditions; and any interval much less than four minutes will be found to involve similar inadmissible conditions.

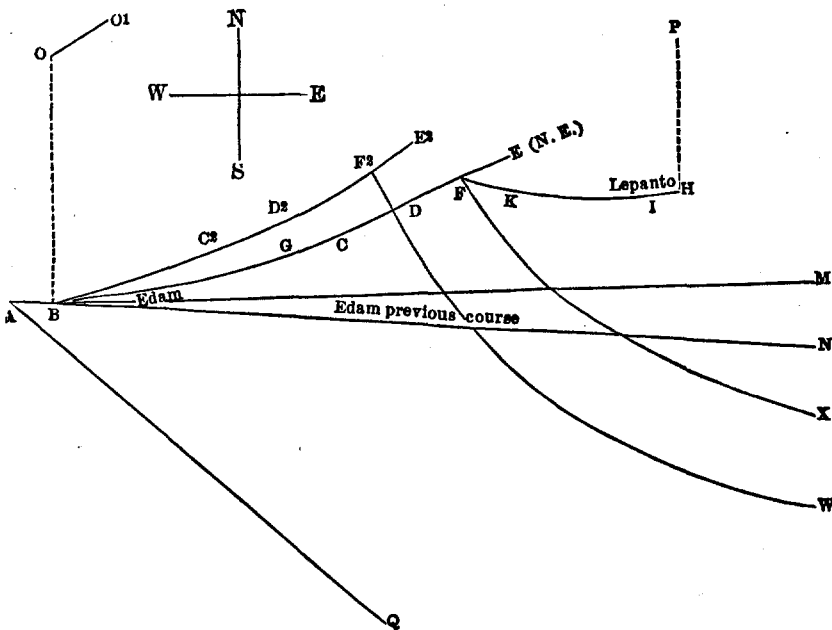
In the diagram annexed, A, E, represents 2,300 feet, the path traversed by the Edam, after hearing the first whistle, according to the *data* above adopted; H, F, 1,100 feet, the path of the Lepanto. The curves, B, C, and D, E, are drawn with a radius of 2,005 feet, the equivalent of a circle completed in 12 minutes when going at a speed of $10\frac{1}{2}$ knots, equal to a change of one point in 394 feet. The curve, I, F, is drawn with a radius of 2,400 feet, instead of 2,005 feet, to allow the Lepanto 875 feet, instead of 788, in which to make her change of two points, in consequence of her very slow speed and reversed propeller. The curves are drawn from O and P as centers, which are at right angles with the courses of the vessels at the time when they first got the effect of the hard over helm at B and at I, respectively. The curve D, E, is drawn with the same radius as B, C, from the point, O¹, as a center, on the line, O, O¹, drawn parallel with and equal to the straight line, C, D, which represents the straight course of the Edam for a half minute under her starboard helm.

An inspection of this diagram shows clearly:

(1) That the Lepanto could not possibly have been in the position assigned her by the Edam's witnesses, viz., three and one-half points on their starboard bow. By no speed possible to the Lepanto, and by no conceivable course, her previous course being west, could she have reached and collided with the Edam at F, from any point what-

soever, on the line, A, Q, three and one-half points on the Edam's starboard bow.

(2) That the same result follows as to any less bearing on the Edam's starboard bow, down to the limit of at least one point; and that from no position whatever on the Edam's starboard bow could the Lepanto from a previous westerly course have reached the point of collision at the same time with the Edam, except by going a longer distance and at greater speed than the Edam, which would convict all on board the Lepanto, that have testified, of a willful fabrication of evidence. Thus, if the Lepanto were a half point, or a point only on the Edam's starboard bow, say at (500 feet E. of) X, or at W,



and changed a point under her port helm every 394 feet, and struck the Edam at F, or F², she would have been obliged to run four minutes, and travel 2,500 feet; and this would have required a previous speed of eight knots, diminishing to five knots only under a slow engine, and she would then have changed six points, and headed at the collision N. N. W., a result incompatible in every feature with either truth or honesty in the testimony on the part of the Lepanto's witnesses.

(3) That no green light of the Lepanto was seen by the Edam's officers three and one-half points off their starboard bow at the time of the first whistle; because the Lepanto could not have been there, nor anywhere approximating that direction; that the entry in the

log, and the lookout's testimony must therefore be accepted on that point, rather than the officers' testimony; that any such green light was seen only after the second whistle; if seen "immediately" after, *i. e.*, within half a minute, it was, doubtless, the Lepanto's white light, as a white light in fog sometimes, as appears in proof, shows green. This is rendered somewhat probable by the context in the log, which indicates that the sight of the green light was the reason for steadying the helm; viz., "believing all was clear,"—a natural belief when that light apparently became visible. This would be a minute and a half before the collision, and at the time when the Edam's mast-head light was seen from the Lepanto. Both white lights ought to have been seen at the same time, and probably were so. The terms "immediately" and "at once" are used so indiscriminately by the Edam's witnesses, especially by the quartermaster and the seamen, as to everything that took place after the second whistle was heard, as to be nearly unintelligible; literally, they would leave scarcely time for anything to be done between the second whistle and the collision; yet we know that much was done, and that the interval was about two minutes. The lookout was in a position to see the Lepanto's real green light some 10 or 15 seconds before the collision; and according to his last statement that may have been what he saw. Gal only saw her red light; De Grad saw her white light a short time after the second whistle.

(4) No minor differences in the evidence as to the *data* upon which the diagram is drawn, such as the rate of speed, the distance run, or the interval of time, would make any material difference in the result. Nothing short of such great differences as would involve perjury in the testimony on one side or the other would be material.

(5) The bearing of the Edam's white light when first seen, viz., W. S. W. from the Lepanto, is very nearly approximated in the drawing, and is an independent circumstance which corroborates the Lepanto's story. As I have said above, it was doubtless seen, as the Lepanto's witnesses state, about one and one-half minutes before the collision, and probably at about the same time that the Lepanto's white light, showing green, perhaps, was seen on the Edam, when the Edam was at G and the Lepanto at K.

(6) Had either or both held her original course, no collision would have happened.

(7) Had the Edam reversed at full speed, as the Lepanto did, though previously going at seven and one-half knots, or even had she been previously going at a moderate speed—say half speed, or five and one-quarter knots—and had slowed only, in either case the Edam would have reached the Lepanto's track at least two minutes later than she did, and the Lepanto would then have been well out of the way; and the Edam, in passing over her actual path of 2,300 feet, would, had she reversed her engines, probably have been stopped before reaching the Lepanto's track at all, as she certainly

would have been stopped had she been previously going at moderate speed and reversed also.

(8) No change of the Lepanto's helm to starboard when the Edam's white light was seen, say at K, 250 feet from F, and one and one-half minutes before the collision, could possibly have affected the result.

(9) Four and one-half knots was a "moderate speed" for the Lepanto, under the circumstances of this case; not only because, as Capt. Taat says, that was not much more than fair steerage-way, (*The Zadok*, 9 Prob. Div. 114,) but also because it was such reduced speed as enabled the Lepanto to come to a full stop long before sailing over her share of the distance that separated the two steamers when their whistles were first heard, and because the evidence shows that she would have been stopped within those limits before collision had not the Edam run within the Lepanto's share of that distance through her own immoderate speed. *The Leland*, 19 FED. REP. 771, 779.

(10) That the Lepanto's reduction of steam pressure was not such as to constitute a fault; because this reduction did not cripple her resources for sufficiently rapid handling in the emergency, nor render her unable to perform her whole duty by coming to a full stop within the limits required of her, viz., her share of the distance between them after the Edam was discovered; and also because there is no evidence that the reduction of pressure was beyond what was usual, or what was necessary for mechanical reasons and for the safe working of the machinery under slow speed. The remarks cited by counsel from the case of *The Hansa*, 5 Ben. 501, cannot be properly applied under such circumstances. There is no arbitrary requirement that a steamer in a fog shall maintain in her boilers the utmost head of steam pressure that her certificate of inspection allows. The Edam also reduced her pressure. That, I infer, is the usual and proper course. If the reduction of pressure by the Lepanto was excessive, that fact should have been proved by some evidence. There was no direct evidence on the subject. The clear inference from the other proof is that the reduction was not excessive.

The counsel for the libelants insist that there must have been delay in the engineer's obeying the Lepanto's order to reverse, because he estimated that two minutes time was sufficient for stopping the Lepanto after her engines got full speed astern, while the log shows an interval of five minutes between the order and the collision. I have already stated why I think the interval was but four minutes. In another branch of the argument the counsel claims that the whole interval was but two and a half minutes. Four and a half minutes were sufficient to stop, according to the engineer's estimate; and all the claimant's witnesses insist that the Lepanto was very nearly stopped when she struck. Their testimony is consistent in this respect; and though it be uncertain within the fraction of a minute

just how long the interval was, there is no reason for supposing that the engineer's estimate of the time required to stop is any more exact. No estimate is of much value unless based on observed facts. A wide difference between the engineer's estimate and the testimony would, indeed, arouse suspicion as to the truth of the testimony. But here, at most, the difference is slight; the basis of the engineer's estimate does not appear; while the testimony as to the fact of prompt reversal is as clear, full, and explicit as possible; and it is an essential part of one consistent narrative. There is not a single fact proved in the case that contradicts it, or is inconsistent with it; and it could not be discredited by the mere estimate of the engineer as to what might be done, even if his estimate were not exactly in accord with the time proved; whereas, in fact, it agrees with it.

This approximate determination of the positions and courses of the two vessels, according to the best evidence on both sides, agrees with the general considerations first above stated, in absolving the Lepanto from blame, and in fixing the sole responsibility for the collision on the Edam. The weight of evidence shows that the Lepanto made no material mistake in location; that she violated no statute, no custom, no requirement of prudence or of nautical skill; that the collision was brought about, primarily, by the Edam's erroneous location of the Lepanto upon her starboard bow, instead of on her port bow, and that this error arose, doubtless, from unavoidable natural causes, and was not in itself a fault; but that the collision was caused, secondarily, by the Edam's previous non-observance of her duty to go at moderate speed, and by her failure, on hearing the Lepanto's first whistle near, to reverse her engines, as she was also bound to do. Had both of these duties been observed by the Edam, the collision would certainly have been avoided; it would probably have been avoided had either of them been observed. The Lepanto, having made no material mistake in location, and having observed all the rules of navigation, and done all she could do to avoid the collision, cannot be justly charged with any share of the loss. Great as this loss was, it must be borne by the Edam, whose faults alone, so far as there was fault, produced it.

The libel is dismissed, with costs.

SONSMITH and others v. THE J. P. DONALDSON.¹SLYFIELD v. SAME.¹

(Circuit Court, E. D. Michigan. September, 1884.)

1. TOWAGE—NEGLIGENCE—GENERAL AVERAGE—THE DONALDSON, 19 FED. REP. 264.

The decision of the district court in this case, (*The J. P. Donaldson*, 19 FED. REP. 264), upon the question of negligence, affirmed; upon the question of general average, reversed.

2. ADMIRALTY—PLEADING—PRAYER FOR GENERAL RELIEF.

Under a prayer for general relief, it is competent for the court to pass such decree as may be required by the proof, although not fully and precisely stated in the libel.

3. GENERAL AVERAGE—UPON WHAT FOUNDED, AND WHEN CONTRIBUTION ENFORCED.

The principle of general average contribution rests upon the doctrine that, whatever is sacrificed for the common benefit of the associated interests, shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice. It will be applied when (1) the ship and cargo are placed in a common, imminent peril; (2) there is a voluntary sacrifice of property to avert that peril; and (3) by that sacrifice the safety of the other property is presently and successfully attained.

4. SAME—INEVITABLE LOSS OF PROPERTY CAST AWAY.

The fact that the property cast away would inevitably have perished even if it had not been selected to suffer in place of the whole, does not prevent the application of the doctrine of general average, unless such sacrifice did not contribute to the safety of the remainder.

5. SAME—INTENTION TO DESTROY.

It is not necessary that there should have been any intention to destroy the property cast away, as no such intention is ever supposed to exist.

6. SAME—RIGHT DEPENDS ON RELATION OF PARTIES.

The right of contribution depends upon an equity arising out of the relation of the parties, and is not based upon the contract of carriage.

7. SAME—STRANGERS—MASTER AS AGENT.

The principle is not applied between strangers, but only between those associated together in a common adventure and placed under the charge of a master with authority to act in emergencies as the agent of all concerned.

8. ADMIRALTY—GENERAL AVERAGE—TOWAGE.

The propeller sought to be compelled to make general average contribution had undertaken to tow three barges from Buffalo to Saginaw. None of the barges had any power of self-propulsion. The contract of towage was for the voyage, the propeller to receive for its services a proportion of the freight earned by each barge. Each barge had its own master and crew, but they had no voice in the management of the propeller, nor in the conduct of their own craft, except in obedience to signals from the propeller. The master of the propeller had charge of the navigation of the whole tow, for the voyage, and for the purposes of that navigation and to meet its exigencies was invested with authority to act for all. When near Erie, Pennsylvania, in a fierce storm, having been driven by force of wind and waves, and in a blinding snow, they were drifting near the rocks on shore and in imminent peril of stranding. The propeller, having signaled her tow to that effect, cut the towing line and cast them off. The propeller was thereby saved. The barges were driven on shore and wrecked. The propeller at once put into the harbor of Erie in safety. Held, that the propeller was bound to contribute upon the principles of a general average.

¹ Reported by J. C. Harper, Esq., of the Cincinnati bar.

In Admiralty. On appeal from district court.

Moore & Canfield, for libelants, appellants.

Maynard & Swan, for claimant, appellee.

MATTHEWS, Justice. These two libels were consolidated in the district court, and dismissed on the hearing. A decree for the libelants was prayed for on two grounds: *First*, for a loss of the barges by the fault of the propeller in towing the barges on a voyage from Buffalo to Saginaw. *Second*, in case no fault in towing was proven, then for a proportion of the value of the barges lost, upon the principles of a general average, on the ground that they had been voluntarily cast off and lost during a storm, for the purpose and with the effect of saving the propeller.

As to the first ground, the evidence justifies and requires the conclusions of the district court. There does not seem to be sufficient ground to impute to the propeller any negligence or failure of duty. If any error was committed, it was a mistake of judgment in the exercise of a discretion necessarily vested in the master of the propeller, and which, if a contrary decision can be supposed to have resulted more favorably, constitutes neither want of skill nor want of care. The loss of the barges, under the circumstances, must be regarded as resulting from the perils of navigation, and for which, under the contract of towage, the propeller cannot be held responsible. It is not necessary to recapitulate the proofs in support of this conclusion. They are fully stated, with the reasons justifying it, in the opinion of the learned judge of the district court, as reported in 19 FED. REP. 264, in which, upon this part of the case, I fully concur.

There remains, however, the more difficult and doubtful question, whether the libelants are entitled to a decree for a contribution from the appellee, upon the principles of general average, on the ground that the loss of the barges was a sacrifice voluntarily made for the safety of the propeller. The facts and circumstances material in the investigation of this, as a question of law, are not disputed, and are, in substance, as follows: The J. P. Donaldson was a steam-propeller, with a crew of 16 officers and men, built for the carrying trade, not an ordinary tug, having no cargo on board on the voyage, during which the loss complained of occurred, but her fuel, amounting to about 120 tons. She had in tow three barges, the Bay City, the George W. Wesley, and the Eldorado, in the order named, on a voyage from Buffalo to Saginaw or Bay City. The Bay City was partly laden with coal, the others were light. The George W. Wesley was a schooner barge; the Eldorado was an old propeller bottom. Neither of them had any power of self-propulsion. The contract of towage was for the voyage, the propeller to receive for her service a proportion of the freight earned by each barge. When near Erie, Pennsylvania, in a fierce storm, having been driven by force of wind and waves, and in a blinding snow, they were drifting near the rocks on shore and in imminent peril of stranding. The propeller, having

signaled her tow to that effect, cut the towing line and cast them off. They were driven on shore and wrecked. The propeller at once put into the harbor of Erie in safety. It is a reasonable conclusion that if the propeller had not cut loose her tow, all would have gone ashore together.

The libels in the present cases do not pray specifically for an adjustment of a general average loss. On the contrary, they pray for a decree against the propeller for the full amount of the loss, on the ground that it resulted from the breach of duty on the part of the propeller in not properly performing the contract of towage. But, under the prayer for general relief, it is competent for the court to pass such decree as may be required by the proof in the record, although not fully and precisely stated in the libel. In this particular the case of *Dupont v. Vance*, 19 How. 162, is quite in point. And in that case, speaking of jettison of cargo, Mr. Justice CURTIS, delivering the opinion of the court, said:

"If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests, and there is a lien on each to the extent of its just contributory obligation."

In the case of *Columbian Ins. Co. v. Ashby*, 13 Pet. 331, in the learned opinion of Mr. Justice STORY, it is shown that the rule as to general average, derived to us from the Rhodian law through the Roman jurisprudence, was not confined to the case of jettison of cargo, although that was the illustration stated in the digest: "That the case of jettison was here understood to be put as a mere illustration of a more general principle, is abundantly clear from the context of the Roman law, where a ransom paid to pirates to redeem the ship is declared to be governed by the same rule." And the doctrine, as received among all maritime nations, was stated to be—"First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained."

It was generally admitted that in case of voluntary stranding of the ship, if the vessel was saved, the principle of general average applied; but it was contended by some that it was not so if the vessel was lost; and such was the opinion of Emerigon, who said: "But it will be a general average if the stranding has been made for the common safety, provided, always, that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is, save who can." 1 Emer. Ins. c. 12, § 13, p. 614. But, in opposition to this opinion, it was decided by the supreme court that the total loss of the ship did not prevent the application of the principle, saying, (page 340,) "it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average;" and, in another place, (page 343,) "for the general principle certainly is that
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whatever is sacrificed voluntarily for the common good is to be recompensed by the common contribution of the property benefited thereby." The same result had been previously reached by Mr. Justice WASHINGTON, in *Caze v. Reilly*, 3 Wash. C. C. 298.

In *Barnard v. Adams*, 10 How. 270, it was said that—

"In order to constitute a case for general average three things must concur: (1) A common danger,—a danger in which ship, cargo, and crew all participate,—a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder; (2) there must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminantis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole; (3) this attempt to avoid the imminent common peril must be successful."

In that case the principal question arose upon the proposition urged in argument, "that if the common peril was of such a nature that the *jactus* or thing cast away (which was the ship) to save the rest would have perished anyhow, or perished 'inevitably,' even if it had not been selected to suffer in place of the whole, there can be no contribution." But this was negatived, Mr. Justice GRIER, delivering the opinion of the court, saying that—

"It is a denial of the whole doctrine upon which the claim for general average has its foundation. * * * The *jactus* is said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved by transferring the whole peril to another part."

In the case of *McAndrews v. Thatcher*, 3 Wall. 347, Mr Justice CLIFFORD, delivering the opinion of the court, said:

"Natural justice requires that, where two or more parties are in a common sea risk, and one of them makes a sacrifice or incurs extraordinary expenses for the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure; or, in other words, the owners of the other shares are bound to make contribution in the proportion of the value of their several interests. Courts universally admit that the Rhodian law was the parent of maritime contribution, although, in terms, it made no provision for any case of general average, except for that of jettison of goods as the means of lightening the vessel. But the rule, as there laid down, has never been understood as being confined to that particular case, but has always been regarded as a general regulation applicable in all cases falling within the principle on which it is founded."

Therefore it has been extended, as in that case, to instances of involuntary stranding of the ship, when extraordinary expenses are incurred in the successful relief and rescue of both ship and cargo, menaced by a common destruction, but only for such as are incurred while the community of interest continues. If the cargo, as in that case, has been separately saved, and has been severed from its connection with the ship and its peril, subsequent expenses incurred for the benefit of the ship alone, and not part of a continuous series

undertaken originally on behalf of both interests, are not the subject of a general average contribution.

"Doubts at one time were entertained," said the supreme court in the case of *The Star of Hope*, 9 Wall. 203-231, "whether a loss occasioned by a voluntary stranding of the vessel, even though it was made for the general safety and to avoid the probable consequences of an imminent peril to the whole adventure, was the proper subject of general average contribution; but those doubts have long since been dissipated in most jurisdictions, and they have no place whatever in the jurisprudence of the United States." In that case it was also said, (page 228:)

"Authorities may be found which attempt to qualify this rule, and assert that, when the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value; but the correctness of the position cannot be admitted, unless it appears that the thing itself for which contribution is claimed, was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices, when there is no peril, present no claim for contribution; but the greater and more imminent the peril, the more meritorious the claim for such contribution, if the sacrifice was voluntary, and contributed to save the associated interests from the impending danger to which the same were exposed. Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice * * *. It is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary, it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved."

The general doctrine was again stated by the supreme court in the case of *Fowler v. Rathbones*, 12 Wall. 102, in the following comprehensive language:

"Where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the safety of all the associated interests, common justice requires that the sacrifice so made, or the extraordinary expenses so incurred, shall be assessed upon all the interests which were so exposed to the impending peril, and which were saved by those means from the threatened danger, in proportion to the share of each in the joint adventure."

The interests usually associated together, in reference to which questions of contribution in general average commonly arise, are those of ship, cargo, and freight; but the language in which the rule is defined, as already quoted, does not restrict it to that association of interests. The right of contribution depends upon an equity arising out of the relation of the parties, and is not based upon the contract of carriage. The obligations of the carrier, indeed, as contained in

the usual bill of lading, do not embrace the case of a part of the cargo carried on deck with the consent of the shipper, and not in pursuance of a custom of the particular trade; and the carrier is therefore in such a case not liable, as such, for a jettison of such cargo necessary for the common safety. The loss is by the perils of navigation, and excepted from the liability of the carrier. Neither is there any right of contribution, as between the deck-load cast overboard and the cargo under deck, unless the deck-load was carried in pursuance of a general custom of the trade, of which the owners of the other cargo must be presumed to take notice and to assent to. In that event, the right of contribution in case of loss by jettison would arise in favor of the cargo so carried on deck; and, as between it and the ship, it would apply, without reference to such a custom, upon the ground that the ship-owners had consented so to carry it. 2 Pars. Mar. Ins. c. 5, § 3, p. 217 *et seq.* and cases cited. Hence, in the case of *Lawrence v. Minturn*, 17 How. 100, the carrier was exonerated from liability as such for the loss of the deck-load by jettison, but without prejudice to the right of the shipper to claim for a general average contribution. In cases of jettison of cargo, the performance of the contract of affreightment by transportation of the merchandise is excused by a peril of the sea, while the obligation to contribute in general average on the part of the ship and remaining cargo arises out of the relation of the parties, as brought together into a common and associated interest united in a single adventure and saved from a common peril, as appears from the case of *Dupont v. Vance*, 19 How. 162. The right of the ship to contribution is certainly not founded on the bill of lading; and there is no privity of contract between the various and distinct shippers, between whom, nevertheless, the law implies, upon the facts, the obligation to make good their respective shares of a sacrifice made for a common benefit. It is therefore not inconsistent with the essential nature of the principle, that the right of contribution should be implied between other parties and interests, where relations are established by contract other than between shipper and ship-owner for the transportation of merchandise. Accordingly the opinion was expressed by Mr. Arnold, (2 Mar. Ins. 398,) that "if a number of ships are lashed together and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so sunk is a general average loss, to which all those saved thereby must contribute." This opinion, based upon continental authorities alone, Mr. Parsons (2 Mar. Ins. 217, in note) doubts; and it must be admitted that no judicial precedent to that effect has been found in the decisions of either English or American courts; and that the case as put lacks the necessary element of a common interest, united by consent of several owners, delivered by the authorized act of a common agent from an imminent peril, threatening the whole, by the voluntary sacrifice of a part.

The true principle was stated by Mr. Justice CURTIS in the case of *The John Perkins*, reported in 21 Law Reporter, 87. That was the case of a libel by the owner of a fishing schooner, the Wyvern, against the John Perkins. The latter was drifting helplessly, inclosed by a field of ice, along the shore of Massachusetts bay, and to avoid an apprehended collision with which, the master of the Wyvern cut his cable, which, with the anchor, was lost. The claim was for a contribution in general average for this loss. Mr. Justice CURTIS treated the subject in an opinion, from which the following lengthy extract is made:

"But the question here is whether a voluntary sacrifice made by one vessel, to avoid or escape an apprehended collision with another vessel, makes a case for contribution in general average. It is certainly true that such a claim, when viewed theoretically, has an equity very similar to, if not identical with, that on which the famous Rhodian law was founded, and out of which the more modern doctrines of the law of general average have grown. '*Omnium contributione sarcitur quod pro omnibus datum est.*' Poth. Pand. 14, 2, 1. '*Equissimum enim est, commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt est merces suos salvos habuerunt.*' Id. 14, 2, 6. At the same time it is quite clear that the Roman law never applied the principle between mere strangers. The Digest (9, 2, 29, 3) says: '*Labeo scribit, si cum vi ventorum navis impulsisset in funes anchorarum alterius et navis funes praececidisset, si nullo alio modo nisi praececidisset funibus explicare se possunt nullam actionem dandam.*' This is the precise case under consideration, except that the cable is cut by the mariners of the other vessel, which can scarcely weaken the claim. Emerigon cites this as good law, and refers to the laws of Oleron and Wisby as containing similar rules as to the removal of an anchor. 1 Emer. Ins. 416, c. 12, par. 14. And at the common law there are cases of urgent necessity in which one whose property is destroyed has no action; as pulling down a house to prevent the spread of a fire, as was resolved in *Case of Saltpetre*, 12 Coke, 13, 16. See, also, Vin. Abr. "Necessity," Pl. 8; *Governor v. Meredith*, 4 Term R. 797; *Respublica v. Sparhawk*, 1 Dall. 363; *Mayor v. Lord*, 17 Wend, 290; *Russell v. New York*, 2 Denio, 461.

"But whether an action would or would not lie when the mariners of one vessel can escape only by cutting the cable of another vessel, and do so, the question here is whether the law of general average extends to a case where the cable of a vessel is cut by its crew to prevent an apprehended collision with another vessel. I am not aware that the right of contribution has ever been extended beyond those who voluntarily embarked in a common adventure. Very eminent writers upon maritime law have considered that the right grows out of and depends upon a contract implied by law from the relation created by the contract of affreightment. Such is the opinion of Pothier, *Traite des contrat de louages Mar.* pt. 2; Art. of Pardessus, *Droit Com.* pt. 3, tit. 4, c. 4, par. 2. Chief Justice PARSONS declares, in *Whittridge v. Norris*, 6 Mass. 131, that the requisites to a case of general average are a contract by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of those concerned, who thereupon are entitled to a contribution from the rest. And in the case of *Dupont v. Vance*, 19 How. 162, as well as in *Lawrence v. Minturn*, 17 How. 109, it will be found that the supreme court considered that the master, in case of necessary voluntary sacrifice to escape peril, was acting as the authorized agent of all concerned in the common adventure, and so bound all by his act,—a principle which could hardly apply between mere strangers. I

have on a former occasion declared that I did not consider the right to recover a general average contribution arises from a contract, (*Sturgis v. Cary*, 2 Curt. C. C. 384,) but from a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned. But I have never entertained a doubt that, from the relation of the parties to a common adventure, the law would imply a contract for the purpose of a remedy. Nor did I then suppose that it would be implied between strangers, who were not united in a common adventure by one or more contracts of affreightment.

"The ancient as well as the modern code of sea laws proceeds upon the assumption that the master, representing all the aggregate interests by holding the office, has the rightful power to judge upon the sacrifice of one of the interests which he thus represented for the benefit of the others. But they afford no ground for the position that he may judge for mere strangers, whose property has not been confided to his care. In my opinion the only subjects bound to make contribution are those which are united together in a common adventure, and placed under the charge of the master of the vessel, with the authority to act in emergencies as the agent of all concerned, and which are relieved from a common peril by a voluntary sacrifice made of one of those subjects. Consequently, I must reject the claim for general average."

The decree of the district court was therefore reversed, but it was further stated in the opinion that the questions were so novel, and attended with so much difficulty, and the equitable considerations in favor of some of the claims were such, that it was not thought fit to charge the appellees with costs.

But the elements wanting to constitute a valid claim for a contribution in general average in the case of *The John Perkins*, seem to be present in the case of this appeal. Here the propeller and the barges were not strangers. They were bound together by the contract of towage. They were interested together in a common adventure. They were engaged to and with each other for the entire voyage, and each interested in its successful issue, as the freight earned by each barge was to be shared between it and the propeller as a compensation for its service. The barges were dependent altogether upon the propeller for motive power, neither of them having any means of self-propulsion. They were powerless for any purposes of navigation, and could only by means of a single sail, ground tackle, and steering apparatus, co-operate with the propeller in its control over them. Each barge, indeed, had its own master and crew, but they had no voice in the management of the propeller, nor in the conduct of their own craft, except in obedience to signals from the propeller. The master of the propeller had charge of the navigation of the whole tow for the voyage, and for the purposes of that navigation and to meet its exigencies was invested with authority to act for all. No ingredient required by the rule to constitute a case for contribution in general average seems to be lacking. There is a common adventure, in which distinct interests are associated by a maritime contract, by which the whole is placed in charge of a common agent authorized

to act for all in its prosecution; and, by his authority, a sacrifice is made of part, in the presence of imminent peril, threatening the loss of all, which results in the safety of the remainder.

What is there in the circumstances and nature of the case to prevent the application of the law of general average? It is suggested that the obligation to make contribution in such a case is inconsistent with the contract of towage, which alone established the relation between the parties, and must regulate their relation, rights, and duties. The contract of towage undoubtedly does not embrace any stipulation which requires such a contribution. The towing vessel is not subject to liabilities as extensive as those of a common carrier of goods. It discharges its whole duty by the performance of the stipulated service with ordinary care and skill. It insures nothing. And it is excused from the further performance of its contract when that becomes inconsistent with its own safety. All that is certainly true. It was no breach of its contract, as has already been admitted in this cause, for the propeller, under the circumstances of necessity into which, with its tow, it was driven, without its fault, to save itself at the expense of the barges, which were cut loose and cast away upon the rocks and beach. But the case is precisely the same when jettison is made of a part or the whole of the cargo. The sacrifice is not a breach of the contract of the common carrier, but puts an end to it, and is justified by the law, notwithstanding the obligation of the contract of carriage. But the contribution is not the less on that account exacted upon principles of equity. In neither case does the duty to equalize the loss grow out of the contract. In both, it grows out of the relation established by the contract; and that relation, so far as that duty is concerned, is in substance the same in both cases.

Whether the facts necessary in law to bring the case within the rule, as stated, would exist in every case of towage, or in those cases where the towage is of the more usual kind, it is not necessary to consider or decide. The judicial result in the present case is predicated as flowing from the relation of the parties, as founded upon their actual agreement, and the particular circumstances which arose in the course of its execution. The relation between the parties to a contract of towage will vary according to the terms of the contract, and the liability of each party to the other, as well as to third persons, may be very different in different cases. In a case of collision (*Sturges v. Boyer*, 24 How. 110, 122) it was said by the supreme court that—

“Whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels, must, under such circumstances, look to the tug, her master or owners, for the recompense which

they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and, from the nature of the undertaking and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation."

In like manner, in such a case, the master of the towing vessel commands and directs, not only his own but the vessels in tow, as though all together constituted but one ship; the tow is intrusted to his care, bound to obey his commands and directions, and subject to his power as though it was mere freight. I am unable to perceive why, in such a case, of which the present is an instance, the law of general average should not and does not apply. The novelty of its application in such circumstances is the strongest ground for rejecting it; but, where the principle plainly includes it, that argument ought not to prevail. The history of the development of the maritime and admiralty jurisdiction in this country is not without the occasional surprise of new discoveries. It was a long time, indeed, before the professional mind of the country accepted the idea that the great rivers and lakes, however navigated in fact, were legally navigable where the tide did not ebb and flow; and the doctrine of *Dupont v. Vance*, 19 How. 162, by which a maritime lien enforceable in admiralty was recognized in favor of a claim for general average, by reason of jettison of cargo, was thought to be an innovation upon the English rule, which confined the remedy to an action of *assumpsit* in the courts of common law, or by bill in equity in the court of chancery.

Contracts of towage, like that in the present case, are exceptional, and of comparatively recent origin, peculiar, perhaps, to lake and river navigation. They certainly differ very essentially from the ordinary and usual towing contracts for towing vessels into and out of port, or for short distances in narrow and tortuous channels. It was in reference to one of such that Sir ROBERT PHILLIMORE spoke in *The I. C. Potter*, L. R. 3 Adm. & Ecc. 292, where the service to be rendered was defined and limited and for a customary fixed price, and where it was held that, even without formally abandoning the contract, the towing vessel—circumstances of serious danger having supervened, not in contemplation of the parties to the contract—was entitled to salvage reward for bringing her tow safely into port, on the ground that she would have been justified in deserting her. The circumstances of the present case preclude the application of any such principle; for, in regard to craft, such as the barges which constituted

the tow, it cannot be supposed that it was contemplated by the parties that in any emergency they could take care of themselves. The contract in the present case was for the whole voyage, in view of all its perils and contingencies, and completely identified the propeller with her tow for all the purposes of the enterprise, the success of which the towing vessel itself, as well as the tow, had mutually agreed to share as the sole price to each for their respective contributions to the common interest. The case is more like that of two carriers who combine in a joint service; as, where on land, one furnishes motive power and an artificial highway, as a railroad, charging toll to the other for the vehicle and its contents, being the goods to be carried; or, as in the case of *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, where a steam-boat carried goods for an expressman. At any rate, without undertaking to specify in what manner and in what degree the rights and liabilities of the parties are extended beyond those growing out of the more limited and ordinary contract for a mere towage service by such a contract as that now under consideration, it is sufficient in this case to say that it had the effect to establish such a mutuality of interest in the enterprise as to constitute the towing vessel and her barges in tow a unit for the purposes of the voyage, so far that a voluntary sacrifice by the master in authority over all of a part for the benefit of the remainder thereby saved from destruction by a peril of navigation must be compensated upon the principle of general average.

The decree of the district court is therefore reversed, and a decree will be rendered in favor of the appellants, respectively, in conformity with this opinion; the amount in favor of each to be ascertained by an intermediate reference to a master to state and adjust the proportionate contribution to be recovered against the propeller, upon the principles of a general average, with costs.

HAWGOOD and others v. ONE THOUSAND THREE HUNDRED AND TEN TONS OF COAL.

(District Court, E. D. Wisconsin. June 14, 1884.)

DEMURRAGE—LIEN—BILL OF LADING.

A ship-owner has a lien upon the cargo for demurrage, enforceable in the admiralty, although the bill of lading contains no demurrage clause.

In Admiralty.

Markham & Noyes, for libelants.

Theodore G. Case, for claimant.

DYER, J. On the seventeenth day of August, 1882, R. R. Hefford, as agent for Pratt, Parker & Co., shipped on board the following

named vessels, at Buffalo, certain cargoes of coal, all consigned to A. Pugh & Co., care of Green Bay, Winona & St. Paul Railroad Company, at Green Bay, Wisconsin, namely: On board the steamer Belle Cross,—which was a steam-barge engaged in towing other vessels and carrying cargoes upon the lakes,—317 net tons of Blossburgh coal; on board the sailing barge Chicago Board of Trade, 693 gross tons of chestnut coal; on board the sailing barge George H. Wand, 638 gross tons of stove coal; on board the sailing barge Little Jake, 654 net tons of stove coal; and on board the sailing barge S. Clement, 783 net tons of stove coal; of all which vessels the libelants were the owners. Freight was to be paid at the rates of 85 cents per ton for the cargo of chestnut coal, and 90 cents per ton for all the other cargoes. The bills of lading provided that the consignee was to discharge cargoes without expense to the masters of the vessels, who were to collect the freight, but they contained no stipulation as to the time within which the cargoes were to be unloaded at their destination, nor as to the payment of demurrage in case of detentions in unloading. The vessels, sailing as a fleet, left Buffalo with their cargoes about August 17th, and arrived at Green Bay on the twenty-eighth of that month. They were there detained, in part, because of the previous arrival of other vessels awaiting discharge of cargoes, but principally for want of facilities for unloading, until the fifth of September, when the last of the fleet was unloaded. The entire cargoes were placed upon the docks of the railroad company, but a portion of the coal was unloaded under an assertion of a lien for demurrage, and a special custodian thereof was placed in charge by one of the libelants, and continued in charge until the coal was seized by the marshal upon monition issued in the present suit. The libelants' right to recover is contested upon every ground of defense set up in the answer, but the only question that will be considered in this opinion is that of the right of the libelants to maintain this suit *in rem* upon their claim for demurrage. The contention of counsel for the claimant is that in the absence of any stipulation in the bills of lading limiting the time within which the cargoes should be unloaded, or providing for the payment of demurrage in case of unreasonable detention, the libelants can assert no lien upon the cargo for loss or damage occasioned by such detention; and therefore that in such case a suit *in rem* is not maintainable in admiralty, but that the remedy of the owners of the vessels, if any, is one exclusively *in personam* against the consignee of the cargoes. From quite an early period there has been a good deal of controversy in the common-law courts, and later in some of the admiralty courts, upon the subject of the rights of ship-owners and other carriers with reference to claims for demurrage. The question seems to have most frequently come up in suits between ship-owner and consignee, and hence direct authority is not abundant upon the precise point here in judgment.

Two English cases (*Phillips v. Rodie*, 15 East, 547, and *Birley v.*

Gladstone, 3 Maule & S. 205) are much relied on in argument by counsel for the claimant, who insists that they declare to this day the law governing a case like the present. Both were common-law actions. *Phillips v. Rodie* was a suit in trover, brought by the assignee in bankruptcy of the charterer of a vessel and consignee of the cargo for 179 bales of cotton which were in the possession of the ship-owner, and held by him on a claim for dead freight and demurrage. It was decided that where the freighter of a ship covenanted that if she should not be fully laden he would not only pay for the goods on board, but also for so much in addition as the ship would have carried for which he had stipulated to pay freight according to different rates, the ship-owner had no lien upon the goods actually on board for the amount of the dead freight; in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board. The ground on which the judgment of the court proceeded seems to have been that there was nothing to which a lien could attach. The claim was for freight not earned, and which it was claimed the ship-owner ought to have earned, or unliquidated compensation for the loss of freight recoverable in the absence and place of freight. Nothing was said about demurrage, apart from the question of dead freight; but, as the ship-owner's claim included demurrage, and as it was held that the plaintiff could maintain his action, it must be implied that the judgment of the court was that there was no lien upon the goods, either for dead freight or demurrage. *Birley v. Gladstone* was an action by the assignee of the freighter to recover money paid by him to the ship-owners under protest, which money was demanded by the ship-owners in respect of goods which were put on board the vessel at the loading port, but were afterwards relanded and restored to the agent of the freighter, under process of law, at the loading port, and for dead freight and demurrage. The action was *assumpsit*. By the charter-party the ship-owner covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of freight which should be delivered at the King's beams, at Liverpool, and so much *per diem* for demurrage. The parties mutually bound themselves—the ship-owners the ship, and the freighter the goods to be laden on board—in a penal sum for the performance of every article contained in the charter-party; and it was adjudged that the ship-owners had no lien upon the goods actually brought home to Liverpool for the sum of money claimed to be due on account of goods which were put on board at the loading port, but afterwards relanded and restored to the freighter's agent, under process of law, at such port, nor for the sum claimed for dead freight and demurrage; and *Phillips v. Rodie* was cited in the judgment as decisive authority upon the points.

It would, perhaps, be enough to say of these cases that as they were suits at common law, requiring judgments upon the common-law

rights of the parties, they are not to be regarded as declaratory of the principles of law which now govern courts of admiralty in determining questions like the present. In this connection the remarks of Judge LOWELL in the case of *The Hyperion's Cargo*, 2 Low. 94, are very pertinent. He says:

"When the common law of England was modified by the introduction of many rules from the law-merchant, the former law had no process for enforcing this reciprocal privilege of the ship and the goods, [that is, the privilege which has its origin in the rule that the ship is bound to the merchandise and the merchandise to the ship,] and had succeeded in repressing the only court that had the requisite modes of action, and was therefore obliged to say that it could not recognize the maxim even when embodied in express contract, as it usually is in English charter-parties. *Birley v. Gladstone*, 3 Maule & S. 205; *Gladstone v. Birley*, 2 Mer. 401. From the time of those decisions to that of *Gray v. Carr*, L. R. 6 Q. B. 522, the history of this question in the courts of common law in England has been that of a struggle between the ship-owners to create liens by stipulation, especially liens for demurrage, and of the courts to narrow the stipulations by construction. See *Phillips v. Rodie*, 15 East, 547; *Faith v. E. I. Co.* 4 Barn. & Ald. 630; *How v. Kirchner*, 11 Moore, P. C. 21; *Tindal v. Taylor*, 4 El. & Bl. 219; *Bishop v. Ware*, 3 Camp. 360. In nearly all the cases the obvious intent of the parties has been disregarded, and a remedy refused for a violated right. In this country the courts of admiralty have retained their proper jurisdiction, and can enforce the privilege by whichever party this action may be invoked. *Dupont de Nemours v. Vance*, 19 How. 162; *The Belfast*, 7 Wall. 624; *The Muggie Hammond*, 9 Wall. 450."

And upon the point whether the privilege extends to demurrage, not expressly stipulated for in the bill of lading,—

"The cases at common law do not afford much aid, because they recognize no general responsibility of the goods to the ship, but only a right of retainer, which they say cannot be conveniently exercised in support of a demand for unliquidated damages,—a point of no consequence in the admiralty."

These remarks are applicable to the cases of *Crommelin v. N. Y. & H. R. R. Co.* 4 Keyes, 90, and *C. & N. W. Ry. Co. v. Jenkins*, 103 Ill. 588, cited on the argument. It was once held, and by some courts is yet held, that, in the absence of a stipulation in the bill of lading providing for the payment of demurrage, no claim for damages can be made. In *Jesson v. Solly*, 4 Taunt. 52, it was decided that if a consignee accept goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in 16 days, and £8 per day demurrage be paid after that time, the master, upon delivery of the goods, may recover demurrage against the consignee. In *Brouncker v. Scott*, 4 Taunt. 1, which was a suit in *assumpsit* by the master of a ship upon an implied promise to pay demurrage, MANSFIELD, C. J., said:

"This form of action for demurrage, without a special contract to that effect, is not of long standing, even in the case where the owners of the ship are the plaintiffs; and, as it generates a question whether the time elapsed was a reasonable time, and also what is a reasonable compensation for the use of the ship, it would be much better if it had not been encouraged, and if the owner had always made it a subject of special contract."

See, also, *Young v. Moeller*, 5 El. & Bl. 755, and *Kell v. Anderson*, 10 Mees. & W. 498.

And in *Gage v. Morse*, 12 Allen, 410, which was a suit at law by the owners of a vessel against the consignee named in the bill of lading for demurrage, it was held that if a bill of lading contains no provision for the payment of demurrage by the consignee, he is not liable therefor, even upon his acceptance of the cargo; citing *Jesson v. Solly* and *Young v. Moeller*, *supra*, and *Chappel v. Comfort*, 10 C. B. (N. S.) 802, and *Smith v. Sieveking*, 5 El. & Bl. 589. But it was held otherwise in admiralty, where the consignee was the freighter, in *Sprague v. West*, 1 Abb. Adm. 548, a leading case, decided by Judge BETTS, in which, upon a review of the authorities, he said:

"Courts of admiralty act upon the rights arising out of maritime transactions, without regard to modes or names of actions, and independent of all forms. The suggestion that demurrage can be claimed upon the footing of express contract alone is undoubtedly giving too narrow an effect to the term. Every improper detention of a vessel may be considered a demurrage, and compensation in that name be obtained for it. 2 Hagg. Adm. 317; *The Apollon*, 9 Wheat. 362."

In *The M. S. Bacon v. Transp. Co.* 3 FED. REP. 344, it was held that an express stipulation for demurrage in a contract of affreightment is not necessary to entitle the owner of a vessel to compensation for her unnecessary or improper detention in loading or unloading: "Reasonable promptitude in delivering a cargo at its point of shipment, and in receiving it at its destination, is a duty implied in such contracts; and for a violation of it, damages, in the nature of demurrage, are recoverable. This is too well-settled, both in England and in this country, to need discussion or authority."

The observations of Judge BLODGETT in *Fulton v. Blake*, 5 Biss. 375, 376, are also in point:

"All persons engaged in dealing with ships, whether master, crew, or consignee, are bound to give them dispatch, and whoever causes any unreasonable delay is answerable in damages. A consignee to whom the cargo of a vessel is consigned should, within the time prescribed by the usage of the port, after notice of the arrival of a vessel, furnish a suitable place for unloading or he shall pay damages for detention, whether demurrage be noted on the bill of lading or not. It may not be what is technically called demurrage in the books, but it is damages for unreasonable detention, unless the vessel has arrived so far out of her expected time as to make such prompt dispatch unreasonable." See, also, *Cross v. Beard*, 26 N. Y. 85.

It is thus apparent that, in the present state of decision, there is no ground for the contention, at least in a court of admiralty, that the right to maintain a claim for demurrage or damages for unreasonable detention of a vessel is dependent upon the existence of a demurrage clause in the bill of lading. That an admiralty action *in personam* will lie, in such case, against the consignee of the cargo, if he is responsible for such detention, is also beyond question, whether the bill of lading contains any stipulation on the subject or not. Why has not the ship-owner also a lien on the cargo for demurrage,

and why may not such a lien be enforced in the admiralty? Demurrage is merely an allowance or compensation for the delay or detention of a vessel. *The Appollon*, 9 Wheat. 362. It is only an extended freight or reward to the vessel in compensation of the earnings she is improperly caused to lose. *Sprague v. West*, *supra*; Holt, Rule Road, pt. 3, c. 1. Why should the right of the ship-owner be limited in the admiralty to a common-law lien, when, in fact, that right is dependent on the law-merchant, which extends the lien or privilege to all charges, damages, and expenses growing out of the affreightment? By the general maritime law, the ship is bound to the merchandise and the merchandise to the ship. It is the doctrine of the law-merchant that the master or ship-owner contracts rather with the merchandise than the shipper; and, as is remarked by Judge SHEPLEY in *Donaldson v. McDowell*, 1 Holmes, 290, "it necessarily follows from this that the merchandise is liable for whatever the shipper is liable." It is unimportant that a demurrage claim is unliquidated. Admiralty takes cognizance of many claims that are unliquidated, such as salvage claims, demands for injury to goods, and claims on account of non-delivery of cargo. In the present extended jurisdiction of the admiralty, and liberal recognition of the rights of parties interested in lake navigation and commerce, no sound reason is apparent why the ship-owner's privilege or lien should not be extended to demurrage. The relation of the ship to the cargo and of the cargo to the ship is reciprocal. If the ship is bound to safely deliver the cargo to the consignee, without exemption from liability, except such as may be named in the bill of lading, the cargo ought to be answerable for the neglect of the consignee to duly receive it. The cargo may be libeled for freight. Why not for the extended freight which the vessel is improperly caused to lose, where, as in this case, the consignee is the owner of the cargo? It may be libeled for general average and numerous other demands. "As in this country courts of admiralty have frequently exercised their jurisdiction to enforce the privilege where the cargo has been libeled for freight, general average, and other charges, there seems to be no just ground for making an exception and refusing a remedy for a violation of duty and right in the case of demurrage, which, under circumstances like those in the present case, is as much a charge or damage which the master may lawfully demand, and for which he has a privilege against the cargo, as the freight itself, of which demurrage is only an extension." *Donaldson v. McDowell*, *supra*. In that case, and in the case of *The Hyperion's Cargo*, *supra*, it was adjudged that the ship has a privilege against the cargo for demurrage or damages, in the nature of demurrage, enforceable in the admiralty, when the cargo has not been received within a reasonable time, through fault of the consignee, although the bill of lading contains no demurrage clause; and it would, undoubtedly, have been sufficient had I simply referred to those cases, and to the reasoning of the learned judges who decided

them, as quite conclusive upon the question. See, also, *275 Tons of Mineral Phosphates*, 9 FED. REP. 209.

But the course of argument has led me to consider the question and the authorities at some length, and I am constrained to say that if the question were an original one I should have little hesitation in coming to the conclusion announced. The libelants received from the consignee, or the consignee's representative, the freight money due them, but it was received under protest and subject to the demurrage claim; and, upon the facts shown, I am of the opinion that the lien for demurrage was not waived or lost by reason of anything that transpired in relation to delivery of the cargoes or receipt of the freight moneys.

Decree for libelants.

THE ISAAC MAY.

(*District Court, N. D. New York. September, 1884.*)

MARITIME LIEN — PRIORITY — MORTGAGE — ADVANCE TO PROCURE RELEASE OF VESSEL—SUBROGATION.

The steam-barge *Isaac May*, while lying at the port of Chicago, was libeled by P. for a breach of a charter-party the year previous, and seized by the marshal, whereupon her owner effected a settlement and release of the vessel by paying \$1,500 to P., which was advanced to him by libelant under the express agreement that libelant should have a lien on the vessel,—the same security that P. had. *Held*, that libelant had a lien for the money so advanced superior to the lien of the holder of an overdue mortgage, who had permitted the owner to compromise the suit and remain in possession and management of the barge, no fraud or collusion between the owner and libelant being charged, and it not appearing that the owner had any valid defense to the suit.

Motion to Confirm Report of Commissioner in Favor of Libelant.

George Wadsworth, for libelant.

Willis O. Chapin, for respondent.

COXE, J. The steam-barge *Isaac May*, a Canadian vessel, was heretofore sold and the proceeds paid into the registry of the court. The libelant, Francis B. Leys, as holder of a maritime lien, seeks to recover of the fund in court \$1,504 and interest thereon. The respondent, Robert Moat, as mortgagee, disputes this claim. In June, 1883, the *Isaac May* was lying at the port of Chicago. She was there libeled by Robert H. Pugh and seized by the marshal of the Northern district of Illinois, the libel alleging a breach of a charter-party the year previous. Her owner, Milton S. May, was with her at Chicago and effected a settlement with Pugh for \$1,500. Being without funds he telegraphed to the libelant, who is a banker at London, Canada, to advance the money. This was done upon the express agreement that libelant should have a lien upon the vessel; the same security that Pugh had. The money was received and paid, and the

vessel, having taken a large cargo of grain, proceeded on her voyage.

The question to be determined is, has the libelant a lien superior to the respondent's mortgage? I think he has. That the Chicago libel stated a cause of action for which the vessel was chargeable there can be no doubt. In compromising this suit, in the manner indicated, May bound himself not only, but also the respondent, who, as holder of an overdue mortgage, permitted him to remain in possession and management of the barge. *The Canada*, 7 FED. REP. 730. Pugh alleged gross negligence on the part of the vessel's master as a reason for the failure to perform his contract. This charge was admitted by May. He interposed no defense. He had none which he thought available. The lien thus became absolute. The libelant made the advance, understanding that he was to be subrogated to Pugh's rights. He would not have parted with his money except upon this express agreement. May could never have defended against his claim. No one who was bound by May's action can defend. The respondent was so bound.

But it is insisted that the evidence discloses a defense to Pugh's libel which might have been interposed. That the evidence shows this is disputed. The respondent relies for confirmation of his position upon a statement made by May to libelant a month after the transaction in Chicago, to the effect that they could not perform their contract with Pugh on account of "distress in weather." In other words May told libelant that the delay was the fault of the weather and not his fault, but that the court would not accept such excuse, "and he was sure to be beaten." It is upon this statement that the respondent bases his argument that Pugh had no claim against the barge, and, therefore, libelant has none. The answer is twofold: *First*, May's statements to libelant do not prove the fact; and, *second*, if they did, the time to assert the defense was in answer to Pugh's libel. It is now too late. A mortgagee can hardly maintain the position that one who has advanced money actually paid for necessary supplies furnished a distressed vessel in a foreign port has no lien because the supplies were warranted, and were found to be of inferior quality. The answer that the master received the supplies without objection and paid the money for them, is conclusive. The best proof of the justice of Pugh's claim is its payment. The libelant is an innocent party who was assured of the existence of the lien and advanced his money in good faith to aid the barge when she was in dire necessity. There is no pretense that there was any fraud or collusion between him and May, or that he knew, or could have known, of any defense at the time of the advance. Justice demands that the agreement fairly made and fairly performed by the libelant should be upheld.

The conclusion reached by the commissioner is correct, and his report should be confirmed.

MCALPINE and others v. HEDGES and others.

(Circuit Court, D. Indiana. September 6, 1884.)

1 FRAUDULENT CONVEYANCE — STATUTE OF LIMITATIONS — CONCEALMENT OF FRAUD.

The making of a deed to defraud creditors, and keeping it off of the record by all of the persons concerned in and cognizant of the transactions, combined with their purposed silence upon the subject, is such a concealment as will prevent the statute of limitations from running until there has been a discovery of the fraud.

2. SAME—RECORD TITLE—LIEN OF JUDGMENT—CLAIM OF TITLE THROUGH UNRECORDED DEEDS—PURCHASER'S IGNORANCE OF UNRECORDED DEED.

One who takes title to land apparently perfect of record, and which seems of record to be, as in fact at law it is, subject to the lien of a judgment, cannot afterwards, upon learning that fraudulent unrecorded deeds had been made, be allowed to claim title through them, in order to defeat the lien of the judgment when at the time of his purchase he had no knowledge of the existence of the deeds, and supposed that he was getting the title as it appeared of record.

Chancery. On plea and demurrer to bill.

McDonald, Butler & Mason, for plaintiffs.

Baker, Hord & Hendricks, for respondents.

WOODS, J. The bill shows the recovery by the complainants of a judgment against John W. Hedges, and that shortly before the date of the judgment Hedges, for the purpose of defrauding the complainants, secretly conveyed certain real estate of which he was owner to another, who, in aid of the fraudulent design, conveyed the same to said Hedges and his wife, in whom the title in part remains, and that for the same fraudulent purpose the parties thereto had kept these deeds off the record and concealed the fact of their execution. To this bill the respondents Hedges and wife have interposed a plea of the statute of limitations, wherein it is alleged simply that the cause of action did not accrue within six years before the commencement of the suit. Is it a good plea?

If the action were at law, or governed by the Indiana Code, the averments of the bill in respect to the concealment of the alleged fraud should probably be regarded as an attempt to anticipate the defense, and consequently rejected or disregarded as immaterial upon consideration of the plea; or, if this be not so, the plea should, perhaps, be construed as meaning that the alleged concealment had occurred and ended six years or more before the bringing of the action. But, the case being in equity, the allegations of the bill in respect to the secret nature and concealment of the fraud I suppose must be regarded as relevant and proper, and, since not specifically denied by the plea, must be taken as confessed, and the plea construed as meaning that the fraud in its origin only—that is, the making of the deeds—occurred outside the statutory limit. So regarded, the plea, in my judgment, is not good. It is claimed that the bill shows no affirmative act of concealment after the execution of the deeds; and in some of the decided cases expressions have been used to the effect

that affirmative subsequent acts of concealment are necessary to stop the running of the statute; but, when considered with reference to the facts upon which these decisions were made, they do not go to the full extent claimed for them. When a fraud is of a secret nature, and in the particular case has been conceived and executed upon such a plan as to secure continued secrecy, without further acts of concealment except silence, the statute ought not to run until there has been a discovery. In such a case it may well be said to have been a continuous concealment. The making of a fraudulent deed, and the keeping of it off the record by all the persons concerned in and cognizant of the transaction, combined with their purposed silence upon the subject, it certainly will not do to say is not a concealment, for which relief may be granted. See *Meader v. Norton*, 11 Wall. 442; *Carr v. Hilton*, 1 Curt. C. C. 238; *Vane v. Vane*, L. R. 8 Ch. 383; *Rolfe v. Gregory*, 4 De G., J. & S. 576; *Hovenden v. Annesley*, 2 Schoales & L. 634; *Buckner v. Calcote*, 28 Miss. 568. Cited to the contrary: *Wynne v. Cornelison*, 52 Ind. 319; *Jackson v. Buchanan*, 59 Ind. 390; *Musselman v. Kent*, 33 Ind. 458; *Pilcher v. Flinn*, 30 Ind. 202; *Boyd v. Boyd*, 27 Ind. 429.

In respect to the question raised by the defendants Gerard, who have demurred to the bill, the proper conclusion may be less clear. As already stated, the bill shows that, as against the Hedges and their grantee in the alleged fraudulent deed, the judgment recovered by the complainants became, under the Indiana statutes concerning fraudulent conveyances, a valid lien upon the land in dispute. See *In re Lowe*, 19 Fed. Rep. 589. The charges of the bill against the Gerards are to the effect that after the rendition of the judgment, and while it remained of record an actual as well as apparent lien upon the land, Hedges and wife conveyed a described part of the real estate in question to one Garrison, "who took the same subject to the lien of complainant's judgment, * * * having no knowledge of said unrecorded deeds, but fully believing said real estate to be the property of said John W. Hedges, as in fact it was," and afterwards conveyed the same part to the Gerards, "who took the same subject to said judgment, they having no knowledge of said unrecorded deeds, and supposing that they derived title only through John W. Hedges as owner, and not through him and his wife as tenants by entireties." Counsel for respondents say:

"We insist in this connection on the two following propositions: (1) That judgment liens are not within the protecting policy of our recording acts. (2) That the question of the ability of John W. Hedges and wife to convey to the Garrisons a good title, depends, not on the knowledge of the Garrisons of the existence or non-existence of all or any of the deeds in Hedges' chain of title, but it depended on the simple existence of those deeds, and the want of notice of the alleged fraudulent character of those deeds.

"The recording act of the state (Rev. St. 1881, § 2931) provides 'that every conveyance, mortgage, etc., shall be recorded in the county where the lands lie,' and if not so recorded within the time prescribed in that section, 'shall

be fraudulent and void as against any subsequent purchaser, lessee, or mortgagee, in good faith, for a valuable consideration.' A judicial decision was hardly necessary to establish the proposition that a judgment creditor is neither a purchaser, lessee, or mortgagee; but, nevertheless, the supreme court has decided that proposition to the fullest extent. *Sparks v. State Bank*, 7 Blackf. 469; *Doe v. Hurd*, Id. 510; *Runyan v. McClellan*, 24 Ind. 165. Even a previously acquired equitable interest in lands has priority over the general lien resulting from a judgment against the holder of the legal title. *Jones v. Rhoads*, 74 Ind. 510; *Monticello, etc., Co. v. Loughry*, 72 Ind. 562. In *Wiseman v. Hutchinson*, 20 Ind. 40, upon the question whether parties who claimed through an unrecorded deed were bound by recitals in the deed, it was held that the claimant was so bound. The court said: 'The registry law has no application to the case. The defendant Remlinger was bound to notice the recitals in the deed from Simpson to Wiseman, not because the deed was recorded, but because she claimed through it. That deed constitutes a part of her chain of title, and she was bound to know its contents and recitals whether it was recorded or otherwise.' In the case at bar * * * the Garrisons and Gerards would have been bound by any recitals in these (unrecorded) deeds whether they had ever learned the contents of the deeds or not. * * * If this is true, the same parties must be entitled to the benefits of the same deeds, just as if they had been recorded in time."

It may be remarked, though it is perhaps not material to the discussion, that the doctrine that the general lien of a judgment upon land is subject to any and all adverse equities or claims, whether secret and unknown, or recorded and known, does not prevail in Indiana against an assignee of a judgment who pays value and takes the assignment in good faith. *Flanders v. O'Brien*, 46 Ind. 284; *Huffman v. Copeland*, 86 Ind. 224, and cases cited. The complainants, however, sue, not as assignees, but as judgment plaintiffs, and are therefore subject to the general doctrine, so far as it is pertinent to the question presented; but in my judgment it has little or no application. The policy of the recording acts is not involved or material to be considered, except incidentally, because the deeds in controversy are not assailed for want of registration, but for alleged fraud in their execution. The attack is not made under the recording act quoted from in argument, but under another section, (Rev. St. 1881, § 4920,) which declares that all conveyances of lands made with intent to defraud creditors "shall be void as to the persons sought to be defrauded;" and only as it may affect the rights of parties under this act can it be material to consider the law concerning the registration of deeds.

The question presented, therefore, is whether or not, under the facts alleged in the bill, the respondents who demur can claim title under unrecorded deeds, of which they had no knowledge when they purchased, to the injury of the plaintiffs, as against whom the deeds were in fact fraudulent and void, or voidable. As against a prior mortgage or deed honestly made to a good-faith purchaser, the general lien of a judgment must unquestionably yield; but this by no means supports the proposition involved in the facts presented, that one may take a title apparently perfect of record, and which seems

of record to be, as in fact by law it is, subject to the lien of a judgment, and afterwards, upon learning that fraudulent deeds had been made, be allowed to claim title through them in order to defeat the lien of the judgment, though at the time of his purchase he had no knowledge of the existence of the deeds, and supposed he was getting the title as it appeared of record. It is true that the owner of land, or one asserting title, is bound by the contents and recitals of all deeds in the chain of title which he claims. But it is not true, as I suppose, and has never been decided, that a purchaser is bound by the contents of unrecorded and unknown deeds which were not essential to the chain of title as it appeared of record, or as otherwise made known to him. It often happens, as may well be supposed, honestly as well as for fraudulent purposes, that titles after various mesne conveyances return to some prior owner, and if the conveyances which constitute such a loop in the chain of title should, for any reason, have been left off the record, it would be a startling proposition indeed that all subsequent grantees must take notice of their contents. Under such a doctrine, if not positively dangerous the registry laws would certainly be made comparatively useless.

It is not true, therefore, that if the deeds in question had contained recitals to their prejudice, the Garrisons and Gerards would have been bound thereby, unless; indeed, when they learned of their existence, they had chosen to claim under them. If not inconsistent with the rights of others, they might, doubtless, have had such an election; but upon the facts stated in this bill it would be unjust to permit its exercise. As against the plaintiffs the deeds were void, and their judgment constituted, under the Indiana statutes, an actual lien upon the premises, (Rev. St. 1881, §§ 608, 752; *In re Lowe, supra*;) and as that lien was apparent of record when the demurring defendants and their immediate grantors purchased, I perceive no just or equitable ground upon which they can be permitted to contest it. They may have paid full price for the land in actual ignorance of the judgment; the bill is silent in respect to this fact; but as the judgment was of record in the county, and, as the title stood, was apparently as well as in fact a lien, they were bound to take notice of it, and ought not now to escape the conclusion by claiming under deeds, upon the faith or knowledge of which they had never acted, and which, if adverse to them, they might have disavowed and rejected, because unrecorded and unknown to them. They say that they are innocent purchasers under these deeds, because they bought in ignorance of the fraudulent purpose for which they were made. It is a sufficient answer that in fact they did not purchase under these deeds, are not bound by them unless they choose to be, and, as against the plaintiffs, they ought not to exercise this choice. If there are equities in the respective claims of the parties, to say the least they are equal; while the legal position of the complainants, as it seems to me, is distinctly the stronger.

The plea and demurrer, therefore, are each overruled.

WIGHT and others v. DUBOIS and others.

(Circuit Court, D. Colorado. October 8, 1884.)

1. MINERAL LANDS—TITLE—RELATION OF CLAIMANTS.

The government, as a land-owner, offers its mineral lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere.

2. SAME—ADVERSE CLAIMS—PUBLICATION OF NOTICE.

Publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land.

3. SAME—PROTEST—CONTEST BEFORE LAND-OFFICE.

After publication of notice, the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable only there. If sustained by the department, the proceedings had by applicant are set aside; if overruled, the protestor or objector is without further remedy.

In Equity. Petition for rehearing.

A. W. Rucker and H. B. Johnson, for complainants.

L. C. Rockwell and J. B. Bissell, for defendants.

BREWER, J. This case comes before me on a petition for rehearing on an order of Judge HALLETT, denying an injunction. The defendants have a patent, and therefore hold the legal title. It is beyond question that, as a matter of fact, they discovered mineral within the limits of their location. It is also beyond question that they complied with all the preliminary steps for obtaining a patent, including the 60 days' publication of notice, and that no adverse claim was filed by the complainants or their grantors during the pendency of such publication. It also appears that after the publication of notice had been completed the complainants challenged before the local land-office, as well as before the department at Washington, the right of the defendant to a patent. That contest was protracted. Many hearings were had before the local land-office as well as at Washington, and as the result thereof the title of the defendants was sustained and the patent issued. Question is made as to whether the defendants discovered mineral in their discovery shaft, and also whether complainants had discovered mineral prior to the publication of the notice.

Now, some general propositions may well be stated: *First*, the government, as the original owner, offers the title to these mineral lands upon certain conditions to whomsoever discovers mineral. The amount of land it will convey to each locator is limited, and certain forms of procedure are prescribed, but the primal fact is that the lands are offered to those who discover the mineral. In this matter the government resembles a private land-owner who makes an offer to sell his lands upon specified conditions. When the patent issues the title passes from the government, and no one can question that title who has not prior thereto, by compliance with the conditions

prescribed by the government, himself acquired an interest in the land. It matters not what wrong the patentee may have perpetrated upon the government; it, and it alone, can complain. In other words, when grantor and grantee are satisfied, a stranger has nothing to say. In *Smelting Co. v. Kent*, 104 U. S. 647, speaking of this question, the court says:

"This complainant cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands. *Boggs v. Mining Co.* 14 Cal. 279. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

So, whether or not it is essential, under the state law, that there be a discovery of mineral in the discovery shaft, no one can raise that question after the issue of the patent, unless he have prior equities in the land. Indeed, as the primal fact is the discovery of mineral, I do not see how the government can avoid its patent on the ground that there was no mineral discovered in the discovery shaft, provided it was, in fact, discovered within the location; and this, notwithstanding it may be conceded that the state law is operative, and requires a discovery in the discovery shaft. This, like the time of publication of notice, the filing of the plat, etc., is mere matter of procedure, and, if the substantive fact of the discovery of mineral exists, I do not see how the government, for any irregularities or defects of procedure, can equitably avoid its patent.

Again, it is, as stated, conceded that no adverse claim was filed by the complainants, and I think it follows therefrom that judgment has gone against them as to all claims which they may have had or supposed they had. The language of the statute is somewhat peculiar, and its peculiarities were commented upon by Judge HALLETT in the opinion filed. It reads:

"If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of \$5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Section 2325, Rev. St.

"It shall be assumed that no adverse claim exists." By whom assumed, for what purpose, and to what extent? By the government, the owner of the land, the party offering it for sale; in order that the claims of all other parties to the land and the benefit of the owner's offer be presented and determined, and that thereafter the government may deal with the applicant alone, inquiring simply whether he has performed the prescribed conditions; and conclusively assumed. The proceedings before the land department are ju-

dicial, or *quasi* judicial, at least. The publication is process. It brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. True, no adverse claimant or supposed claimant may be named in the notice; no process may be served personally upon him; but that does not avoid the notice, or weaken its sufficiency to bring such party into court. This is not the only case known to the law in which parties not named in a notice are by it brought into court and their rights adjudicated. Unknown heirs are often thus brought in by a published notice. Tax proceedings, condemnations of rights of way, admiralty cases, and many others present familiar illustrations. The sufficiency of the notice in these cases is unquestioned, even though the adverse claimant be not named, and no personal service be had. And if the parties be brought in, obviously it is that their claims be presented and determined. The succeeding section provides how such claims, if presented, shall be determined. Even without such section the purpose would be apparent. It would be grievous wrong to leave disputed claims unsettled, and when the owner of lands making such general offer prescribes time, place, tribunal, and manner of settling adverse claims, such provisions are a part and condition of the offer, and should be vigorously insisted upon by the courts.

Conclusively assumed, any other rule would destroy the practical value of the provisions. If, notwithstanding his failure to adverse, a party may still present and litigate his rights, of what use to adverse? A failure to do so might give his adversary the advantage of a *prima facie* title, but the real question, the absolute rights, would remain undetermined. The applicant would hesitate to improve and develop his property because ignorant of what contests were before him, what claims might be presented. And the contestant might wait till the evidence in favor of the applicant's right had ceased to exist, or passed beyond his control, and then unexpectedly come forward with his claims. I do not mean that cases may not arise in which equity will interfere thereafter, if there be equitable grounds for interference, as where, by the acts of the applicants, those who might have adversed have been prevented, deceived, or misled; but unless such equitable reasons exist, and none such appear in this case, he who fails to adverse until the expiration of publication is absolutely cut off, and cannot be heard to say that he has prior rights.

Judge HALLETT, in his opinion, finds that these complainants were in a position to adverse at the time of this publication. Notwithstanding the averments of the last bill and the affidavit of Mr. Wight, I think the general scope of the testimony sustains that finding. But it is said by counsel that, under the last clause of the statute quoted, any person may object that the applicant has failed to comply with the terms of the chapter; and why should they not have the same privilege as strangers? Have they forfeited this right by failing to

adverse? It becomes necessary to see what rights this last clause gives. I think all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiæ*,—a friend of the court,—to suggest that there has been error, and that the proceedings be stayed until further examination can be had. Such a protest does not bring the protestant into court for the assertion of his own title or rights; does not revivify rights lost by a failure to adverse. True, if the protest or objection is sustained, the proceedings will be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights; but if the protest or objection be not sustained, the objector, like an *amicus curiæ*, has nothing more to say in the matter. In other words, the right to protest is not the right to contest. The latter is lost by the failure to adverse. The former remains open to every one, holders of adverse claims as well as others. But the protest is only to the officers of the government, challenges only the applicant's claims, and in no manner brings up for consideration any claims of the protestant. Such a protest can be made only before the land department, and, if there rejected, the protestant has no further standing to be heard anywhere. The protest cannot be made the basis of any litigation in the courts, for the courts are only open to those who have rights to assert; they sit for the determination of controversies. They do not, at the instance of strangers, review the regularity of proceedings between parties who are competent to determine such regularity, and who do not themselves invite any judicial determination.

These in brief are my views, and, without pursuing the discussion further, I sum up these propositions: *First*, the government, as a land-owner, offers its lands for sale upon certain prescribed conditions, compliance with which is a matter of settlement between the owner and purchaser alone, and with which no stranger to the title can interfere; *second*, publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented it is conclusively presumed that none exist, and that no third parties have any rights or equities in the land; *third*, thereafter the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable only there; if sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protestant or objector is without further right or remedy.

Entertaining these views, I think the petition for rehearing must be denied.

ATKINS v. VOLMER and others.

(Circuit Court, D. Minnesota. October, 1884.)

1. MECHANIC'S LIEN — MORTGAGE — NECESSARY PARTIES TO A FORECLOSURE — PRIORITY OF LIENS.

An assignee of a mechanic's lien is a necessary party to a suit to foreclose a mortgage given after the lien commenced, although the mortgagee had no knowledge of the existence of the same and the mortgage was filed of record before the commencement of statutory proceedings to enforce said lien.

2. SAME—EJECTMENT.

A purchaser at the sale of such a mortgage by advertisement acquired no right to eject a purchaser at a sale made under final decree in proceedings to enforce the mechanic's lien, the mortgagee under above circumstances being in the position of a subsequent incumbrancer to the mechanic's lien holder.

This is an action of ejectment, and, a jury being waived, is tried by the court. The facts are briefly these: John Leavey, owner of the land in controversy, mortgaged the same to A. A. McLeod, June 14, 1877, to secure the payment of \$400, due June 14, 1882. The mortgagee assigned the mortgage to the plaintiff, which was recorded January 26, 1878. On December 28, 1877, in certain proceedings commenced to enforce a lien under the mechanic's lien law of Minnesota, a judgment and decree was ordered by the court, adjudging the amount due for materials, etc., furnished in the erection of structures on the land, and decreeing the same a specific lien thereon, commencing August 22, 1876. The proceedings to enforce the lien were commenced by Hersey, Bean & Brown, making Leavey, the owner of the land, a party. The mortgagee and his assignee, the plaintiff, knew nothing of the mechanic's claim or lien, and were not served with notice of the proceedings. On default on the conditions and terms of the mortgage, it was foreclosed by advertisement, and the land described therein sold June 18, 1879, and purchased by the assignee and owner of the mortgage, and the title acquired by the sale perfected in the purchaser. No notice was served upon the mechanic's lien holder, whose judgment was entered of record previous to the first publication of the notice of foreclosure. A final decree in the suit to enforce the mechanic's lien was entered, confirming the purchaser's title by virtue of the sale to enforce the lien.

S. L. Pierce, for plaintiff.

Castle & Castle for defendants.

NELSON, J. The foreclosure of the mortgage by advertisement did not effect the mechanic's lien, and the plaintiff's title acquired at the sale was subject to the claim of Hersey, Bean & Brown, who enforced the lien. The defendant Volmer, who succeeded to their title, took possession of the premises soon after his purchase, and is at least in the situation of a mortgagee in possession by permission of the mortgagor. Although the plaintiff's mortgage was filed of record previous to the commencement of the proceedings to enforce the lien

of defendant's grantors, it did not thereby take precedence as a prior lien. The mechanic's lien operated as such from the time of furnishing the materials, which commenced August 22, 1876, and the statutory steps necessary to complete and perfect it being pursued, the plaintiffs acquired, by foreclosure of the mortgage and purchase at the sale, no right to eject the defendant Volmer from the premises. The plaintiff in this case, standing in the position of a subsequent incumbrancer to the lien of the defendant Volmer's grantors, which has never been paid, is not entitled to recover in this proceeding. It is not necessary to decide at this time whether a bill to redeem will lie. The cases cited from Indiana and Illinois are not decisive of an interpretation of the mechanic's lien law of Minnesota. The objections of the plaintiff to the validity of the proceedings, etc., taken at the trial, are overruled.

Judgment will be entered in favor of the defendants.

WATSON v. CENTENNIAL MUT. LIFE ASS'N.¹

(Circuit Court, E. D. Missouri. September 24, 1884.)

1. INSURANCE—IMPLIED CONTRACT OF MARRIAGE.

A. and B. lived together as husband and wife and recognized each other as such in their intercourse with friends, for 10 years, though no marriage ceremony had been performed. A. provided for both, and B., like a wife, kept house for him; but in taking out a policy of insurance on his life for B.'s benefit, A. had her name inserted as Mrs. B. instead of Mrs. A. In an action by B. on the policy, *held*, that B. was A.'s wife, and had an insurable interest in his life.

2. SAME—MISREPRESENTATIONS—WAIVER.

Where, after discovering that an assured has made misrepresentations to it in his application for a policy, an insurance company continues to collect assessments, it thereby waives any right it may have to declare the policy obtained by such misrepresentations invalid.

Action on Policy of Insurance.

Hugo Muench, for plaintiff.

Davis & Davis, for defendant.

BREWER, J., (*orally*.) Two defenses are interposed in this case: *First*, that the complainant was not the wife of the insured, and had no insurable interest; and, *second*, that in the application for the policy the insured represented himself as a steam-boat man, whereas, as a matter of fact, he was a gambler by profession.

In reference to the first question, the testimony indisputably shows that for 10 years prior to the death of the insured he and the complainant lived together as husband and wife. There was no ceremony at the institution of that relation, but they lived together as husband

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

and wife continuously during those years in the same home, recognized as such by each other and by all in whose society they lived, he providing as husband for her and she taking care of the household duties, both visiting her friends and being introduced, when with them or traveling, as husband and wife. While in that relation he took out an insurance in her name as Mrs. Nellie Brooks. The mere name cannot change the fact of the mutual relations of the parties. The fact that no ceremony took place at the time the relation was entered upon does not prevent them, under the decisions of this court, as well as the supreme court of the state, from being adjudged as husband and wife; and, being in such a relation, she had an insurable interest, and can maintain this action.

As far as the other defense is concerned, that he was a gambler instead of a steam-boat man, the facts are that he had been a steam-boat man, but, perhaps, during the last few years prior to his death, had ceased to go up and down the river. But that fact was known to the company at least as early as May 24, 1883. After that it sent its notices for assessment, which were directed to him and paid by her, and thus the knowledge of the fact, even if a material fact, and such as to vitiate the policy, having been brought home to the company, any objection on that account was waived by it. Indeed, it is questionable whether, under the statutes of the state of Missouri, referred to by counsel in his brief, that otherwise would constitute any defense, because it does not appear that it was material to the risk, and no tender of moneys received on account of the policy was made by answer or on the trial. The decree, therefore, will go for the complainant as prayed.

SHELLEY v. St. CHARLES COUNTY COURT and another.¹

(Circuit Court, E. D. Missouri. September 20, 1884.)

1. MUNICIPAL BONDS—BONDS NOT "ORDERS."

Bonds issued under the act of the general assembly of Missouri concerning the reclamation of swamp lands, approved March 14, 1870, are not "orders" or warrants within the meaning of section 8 of the act of March 3, 1869, and are payable at maturity, regardless of the order of their presentation for payment.

2. SAME—PROMOTION OF SUITS FOR COLLECTION OF TAXES—EQUITABLE LIEN.

The fact that delinquent taxes, levied for the payment of county bonds of a certain class, have been collected and paid into the county treasury through the instrumentality of an attorney, acting for a holder of bonds of that class, does not entitle such bondholder to a lien upon the funds so collected,

Mandamus. Demurrer to return.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

This is a proceeding by *mandamus* against the judges of the county court of St. Charles county, in the state of Missouri, and the treasurer of said county, to enforce the satisfaction of a judgment rendered in this court upon certain bonds and coupons issued by St. Charles county, under the act of March 14, 1870, for the improvement of certain swamp lands. The relator alleges that said treasurer has \$1,687.50 in his hands, which should be applied towards the payment of said judgment, and that the payment of said sum upon the bonds merged in said judgment has been demanded and refused. In answer to an alternative writ of *mandamus*, directed to him and said judges, said treasurer has made a return in which he substantially admits the possession of \$1,687.50 as proceeds of a tax levied to pay the bonds in judgment merged; but, in denial of relator's rights to a peremptory writ, said treasurer sets up that the taxes levied in pursuance of the act of 1870, for the payment of bonds and coupons issued thereunder, became in great part delinquent for the years 1873 to 1877, inclusive; that from sales made under execution issued on judgments rendered upon suits brought by the collector to recover the same, certain moneys were collected, out of which the attorneys for the collector, as well as the collector himself, retained as fees certain sums in excess of the legal allowance, which sums so illegally retained were refunded on suit brought by the county court, and paid into said treasurer's hands, and constitute the fund now in his possession; that the suits instituted for the recovery of said taxes and illegal allowances were promoted by one Theodore McDearmon, an attorney who represented two parties, who together owned \$5,500 of bonds issued under said act, and which matured before those merged in the relator's judgment; that payment of said fund upon the bonds merged in the relator's judgment had been refused, when demanded, because of the aforesaid facts, and because said McDearmon had previously, and before said fund came into said treasurer's hands, demanded payment of the bonds owned by his clients, and the demand, though refused, had been duly noted as required by law. In conclusion the respondent states that he is ready and willing to pay over said sum to the proper party, but does not know whether it should be paid to the relator or McDearmon's clients. To this return the relator demurs.

E. B. Sherzer, for relator.

Dyer, Lee, & Ellis, for respondent.

BREWER, J., (*orally*.) In the *mandamus* proceeding against St. Charles county, as far as the proceedings are now concerned against the treasurer, there are two questions presented by him: *First*, that under the law of 1869, which provided for the issue of warrants, they were to be paid in the order of their presentation to the county treasurer, and the provisions of that law are invoked on behalf of the fund now in the hands of the county treasurer. We do not think that law applicable. The law of 1870 provided for the issue of bonds running through a certain series of years. There is a vast

difference between bonds and warrants. Warrants are general orders payable when funds are found, and there is propriety in the rule providing that they shall be paid in the order of presentation, the time of presentation to be indorsed by the treasurer on the warrants. But bonds are obligations payable at a definite time, running through a series of years. They are payable when the time of their maturity arrives, independent of any presentation. So we think, impliedly, the law of 1870 does away with that restriction as to payment in order of presentation. The other question is that there is a sort of equitable lien on these funds in favor of the holders of some other claims, by reason of the fact that this fund was brought to the treasury through the instrumentality of the attorney of such claimants. We fail to see how that lien can exist. There was a legal duty to collect this fund, and, if urged by and at the instance of some other party, that fund was collected, such urgency or interference or effort on his part does not give to him an equitable lien on the funds. So we think the *mandamus* must go directing the county treasurer to pay over this money.

CASE OF THE UNUSED TAG.

In re AH KEE.

(Circuit Court, D. California. September 22, 1884.)

1. CHINESE IMMIGRATION—CUSTOM-HOUSE TAG—CERTIFICATE—ACTS OF 1882 AND 1884.

A Chinese laborer, in September, 1883, went back to China, after obtaining from the custom-house officer a "tag" entitling him to the certificate required by the act of 1882, but without procuring the certificate itself, and in August, 1884, returned to the United States and sought to land by virtue of his "tag." *Held*, that the act of 1884, which declares that the certificate issued to the laborer should be the only evidence permissible to establish his right to re-enter the United States, was as applicable to the certificate issued under the act of 1882, as to a certificate issued under the act of 1884, and that he was not entitled to re-enter.

2. SAME—REMOVAL OF CHINAMAN UNLAWFULLY RETURNED—DUTY OF STEAM-SHIP COMPANY.

The acts of congress, both original and amendatory, contemplate that parties unlawfully bringing here Chinese laborers prohibited from landing shall take them back to the country from which they are brought, or, at least, beyond the jurisdiction of the United States; and a steam-ship company cannot escape from this duty by the departure of the vessel on which they are brought, or any change in its officers or management. .

Per FIELD, Justice.

3. SAME—HABEAS CORPUS—RELEASE OF CHINAMAN ON BAIL—DEPARTURE OF VESSEL—REMANDING TO MASTER ON RETURN OF VESSEL—REFUSAL OF MASTER TO RECEIVE HIM—PENALTIES.

When, on proceedings by *habeas corpus* to test the right of a Chinese laborer to re-enter the United States, his body is produced in court, the court may order that he continue in the custody of the party detaining him, or commit

him to the custody of the marshal, or release him on bail to await a decision of the question, and when he has been released on bail he is still deemed in the custody of the law, and as never having been landed; and if, before final decision, the vessel on which he was brought departs on its regular trip, when she returns he may be remanded to the master, whether he is the one who produced him or another, and a refusal to receive him when so remanded would constitute an aiding and abetting or permitting the landing of a person unlawfully, within the provisions of sections 1 and 2 of the restriction act, and both the master and the ship under his command would incur the penalties pronounced by sections 10, 11, and 12 of the act.

Per SAWYER, J.

On Habeas Corpus.

T. D. Riordan and L. I. Mowry, for petitioner.

S. G. Hilborn and Carroll Cook, for the United States.

FIELD, Justice. The petitioner is a Chinese laborer and a subject of the emperor of China. He resided in the United States on the seventeenth of November, 1880, and until September 3, 1883. He then went back to China without the certificate required under the restriction act of 1882, which would have enabled him to return to this country. Previous to his departure he applied to the collector of customs at the port of San Francisco for such certificate, and, as he alleges, the provisions of the law for the registration of a description of his occupation, residence, and age, and of the physical marks and peculiarities necessary to his identification were complied with by the collector, and from him the petitioner received a white tag, which entitled him to the desired certificate. The act of congress appears to contemplate the presence of the collector in person, or by deputy, on board of a vessel cleared or about to sail to a foreign port with Chinese laborers, and his making while on the vessel a list of them, with the particulars mentioned of each one for his identification, such particulars to be entered in proper books to be kept for that purpose. To carry out these provisions on board of the vessel was found to be impracticable. Passengers are not generally expected or even allowed to be on board of a vessel many hours before its departure, and the time consumed in the examination of each laborer, if such examination were had on board, would necessarily greatly limit the number to whom a certificate could be furnished,—a small portion of those who would desire to depart by each vessel of the line of steamers now plying between this port and China. To obviate the delays which would otherwise arise, the officers of customs at San Francisco have prescribed rules requiring Chinese laborers intending to leave and yet desirous of returning to the United States to attend at the custom-house in advance of the departure of the vessel, and undergo the preparatory examination. That being satisfactory, a white tag is given to the laborer, in exchange for which a certificate is issued to him on board of the steamer. These regulations are designed to facilitate the departure of laborers without unnecessary delay on board of the vessel, and, being reasonable, may properly be insisted upon. The essential requirement of the law is the registry of the par-

ticulars respecting each laborer, so as to identify him. The place where the examination is had is not an indispensable part of the requirement.

The petitioner having, as he alleges, secured his white tag, went aboard of the steamer City of Pekin, at San Francisco, when about to depart for China, expecting there to receive in exchange for it a certificate entitling him to return, and was informed that the officer charged to deliver such certificate had already been aboard of the vessel and left. The petitioner accordingly went among his countrymen on the vessel, without further inquiry for the officer, and left without his certificate. In August, 1884, he returned to the port of San Francisco in the steam-ship City of New York, and sought to land by virtue of his tag, which he presented to the collector. Upon examination of the records in the collector's office it appeared that the certificate intended for him had been presented by another person, who had arrived on a previous steamer, and by virtue of it had been allowed to land. The certificate was, upon such landing, canceled. The petitioner was accordingly not allowed by the collector to land, and he now seeks to secure a right to land from the court.

It is by no means clear that the petitioner would not have found the officer having his certificate had proper inquiry been made. His willingness to depart without effort for that purpose tends to create a suspicion as to his conduct. But assuming that there was no purpose to facilitate the use of the certificate by another, whilst he retained the tag, no relief can be afforded him on this application.

The restriction act of May 6, 1882, suspended after 90 days from its passage, and for the period of 10 years from its date, the right of Chinese laborers to come to the United States, or, if already come, to remain unless they were within the United States on the seventeenth of November, 1880, or should come before the expiration of 90 days after the passage of the act. For the purpose of identifying the laborers in the United States on the seventeenth of November, or coming within the 90 days mentioned, and in order to furnish them with proper evidence to depart from and return to the United States, the act provided that a certificate, as already described, after registration of the particulars mentioned, should be issued to the laborer; and the amendatory act of 1884 declares that "said certificate shall be the only evidence permissible to establish his right of re-entry." This declaration is as applicable to the certificate issued under the act of 1882, as to that issued under the act of 1884. In the face of its clear and emphatic direction, nothing can be taken as an equivalent or substitute for the certificate. It matters not that the petitioner was entitled to have a certificate from the collector. If he has not got it, the court cannot help him. That is the "only evidence permissible," says the statute, and the court has no power to dispense with its requirement in any case, however great its hardship. The court is itself but the servant of the law, and equally bound with

others to follow and obey it. If the collector refuses to the Chinese laborer any rights to which, under the restriction act, he is entitled, he should apply to the superior of the collector at Washington, the head of the treasury department, for proper instructions to him. The court has no supervising jurisdiction over the manner in which he discharges his duty.

The writ must therefore be discharged and the petitioner be remanded. If, as stated by counsel, the vessel on which the petitioner arrived has left the port of San Francisco since his arrival, the marshal can place him on any other vessel of the steam-ship company, when it is about to depart for China; to be deported, and for the expenses attending the charge of the party and his removal the company will be liable. Act of 1884, § 12. The acts of congress, both original and amendatory, contemplate that parties unlawfully bringing here laborers prohibited from landing, shall take them back to the country from which they are brought, or at least beyond the jurisdiction of the United States; and the steam-ship company cannot escape from this duty by the departure of the vessel on which they are brought, or any change in its officers or management.

Writ dismissed and petitioner remanded.

SAWYER, J. On the argument of this case before myself and the district judge we were both satisfied that the petitioner was not entitled to land on the presentation to the deputy collector of his preliminary white tag, delivered to him at the custom-house as evidence of his right to the proper certificate, accompanied by the explanation given of his failure to produce the certificate required by the act, and the other evidence, satisfactory if admissible, produced of his residence in San Francisco at the date of the treaty of November 17, 1880; and we were prepared to decide that he must be remanded to the custody of the master of the steam-ship on which he arrived, to be transported to China, whence he came.

We held, in the case of *In re Leong Yick Dew*, 19 FED. REP. 490, that under the act of 1882, in force at the date of his departure, the prescribed certificate is the only evidence upon which a Chinese laborer, to whom the provisions of section 4 are applicable, can be permitted to land. The same ruling was made by the district judge in the case of *In re Shong Toon*, 21 FED. REP. 386. Under the amendatory act of 1884, if that act were applicable, the certificate prescribed in section 4 of the act is in express terms made the only evidence upon which a Chinese laborer, to whom the provisions of that section are applicable, is authorized to be landed. The language is not open to any other possible construction. Such was the view, generally expressed, taken by us in the case of *In re Ah Quan*, 21 FED. REP. 182.

The petitioner in this case was, undoubtedly, entitled to his certificate, but he was negligent in not procuring it. It was his own

fault that he departed without it. At all events, whether he was negligent or not, the law prescribes this certificate as the only evidence of his right to re-enter the country, and we are not authorized to dispense with it on the grounds set up, or any other. If he did not obtain his certificate, it was not the fault of the law. The certificate is made by the statute the only admissible evidence of a right to re-enter the United States. If, from his own failure to pursue the mode prescribed by the statute, and reasonable regulations made by the collector for the purpose of facilitating the performance of the duties imposed upon him by law in relation to departing Chinese, a party fails to obtain the prescribed certificate; or if, for any reason, the officers appointed to execute the law either rightfully or wrongfully refuse to furnish the certificate, this affords no ground for the courts to dispense with it. No dispensing power has been conferred upon the courts. The fault is not with the law, in such cases, but with the party himself, or in the administration of the law by the duly-appointed officers, and the remedy, in either case, is not to be found in any dispensing power in the courts. The courts must administer the law as they find it, however severe in its requirements, and they are not authorized to amend or abrogate it. If the law works hardship in particular cases, the remedy must be sought elsewhere. While this was our view, the question is one of international importance, and there being no appeal to the supreme court, where such questions should be determined, and a justice of that court, having jurisdiction to determine the question in the circuit court, being daily expected, we deemed it but just and proper that the question should be reargued and resubmitted for our joint consideration and decision. Our own views, it was thought, might possibly be modified by consultation and further discussion, or, in case of a difference of opinion, the question involved, of so great importance, might then be brought before the highest tribunal of the land on a certificate of opposition of opinion, and thus be authoritatively and finally determined. Upon such further argument and consideration we are fully confirmed in the correctness of the conclusion before reached, and we therefore concur in the order remanding the petitioner.

It has been suggested that the steam-ship has departed, and the question has arisen and been fully argued as to what shall be done with the petitioner in that case. Section 9 of the act requires the collector of the port, or his deputy, to go on board steam-ships from foreign ports having on board Chinese passengers, examine such passengers, and compare the required certificates produced with his list and with the passengers. And it then provides that "no passenger shall be allowed to land in the United States from such vessel in violation of law." They are to remain on the vessel, to be carried away from the country, and the master who should permit, or aid and abet, the unlawful landing of one of such persons would be guilty of the offense created by the statute. In obedience to the determi-

nation of the collector in this case, the master refused to permit the petitioner to land, and, this detention being claimed to be unlawful, a writ of *habeas corpus* was sued out to have the question as to whether the detention is lawful or unlawful judicially determined. This is a right which the law of the land gives him. The number of this class of cases is such that it is found impossible, in practice, to determine all the cases before the departure of the steamer, and it becomes necessary, in such cases, to take the petitioner into the custody of the court, otherwise he would be carried beyond its jurisdiction pending the proceeding, and his petition be thus rendered of no avail. When the body is produced in court the petitioner is, for the time being, in the custody of the law, and he can be temporarily committed to the custody of the party producing him, if deemed safe to do so, or committed to the custody of the marshal, or admitted to bail, until the lawfulness of the detention can be inquired into and determined. In such case, when the steamer is about to regularly depart on its duly appointed voyage, and a party so confined is produced on a writ of *habeas corpus* and admitted to bail, or committed to the custody of the marshal pending the investigation, although *actually* on shore he is only *provisionally* so, and he has not, in contemplation of law, been landed, but only held in the custody of the law till it can be determined whether or not he is entitled to land. When that question has been determined against the petitioner, I have no doubt of the power of the court to remand him on board the ship to the custody of the master, whether it be the same master or another who has in the mean time taken his place; and, if the ship has departed pending the proceeding, that the petitioner can be detained by the marshal, by the order of court, till the return of the ship, to be then placed on board by the marshal in the custody of the master, and that it is the duty of the master to receive him, and not thereafter to permit him to land. In such case the party has only been provisionally taken from the ship out of the custody of the master, who detains him in his character *as master* controlling the ship, and not in his individual personal character. He is taken into the custody of the law solely for the purpose of securing his discharge in case his detention proves to be unlawful. He has not, in contemplation of law, been landed at all; he is still under control.

It has been suggested that the master might refuse to receive him after his departure and subsequent return to port. So he might refuse to receive him before his departure. But in either event, as the petitioner has been only provisionally in the custody of the law, and not landed in contemplation of law, such refusal would, in my judgment, constitute an aiding and abetting or permitting the landing of a person not lawfully entitled to enter the United States, within the meaning of the provisions of sections 1 and 2 of the restriction act, and both the master so aiding and abetting or permitting the unlawful landing, and the ship under his command, would incur the

penalties denounced by sections 10, 11, and 12 of said act. The vessel—the instrument, or the *res*—employed in unlawfully bringing the party into the United States, as well as its master, is held responsible as a participant in the unlawful act. In case it is made to appear, by the return of the marshal, that the vessel has departed, I have no doubt of the authority of the court, under the provisions of section 12 of the act, by its writ or order, to empower the marshal to remove the petitioner remanded to the country whence he came, by any other vessel conveniently available for the purpose, at the expense of the United States, as being a person “found to be one not lawfully entitled to be or remain in the United States.” The direction contained in the statute, “cause to be removed,” involves the power to use the necessary means to accomplish the required object. We so substantially held in *In re Chon Goo Pooi*. And the district judge also so held in the case of *In re Chin Ah Sooy*, 21 FED. REP. 393. This power existing in the court, I can perceive no good reason why the order remanding the petitioner may not, in the first instance, be in the alternative, commanding the marshal to return him to the custody of the master of the vessel on which he came, and, in case it shall be found by the marshal that the vessel is gone, that he place him on board on the return of the vessel; or, on the direction of the court, that he remove him to the country whence he came, upon any other vessel conveniently available for the purpose, at the expense of the United States, to be afterwards recovered from the parties liable therefor under the statute.

In my judgment, the petitioner must be remanded, and in case it shall prove to be impracticable to return him on board the vessel on which he came, by reason of the departure and probable non-return of the vessel at an early day, that the marshal be directed to return him to China, whence he came, on some other vessel available for the purpose, at the expense of the United States, which expense may be recovered, under section 12, from the parties responsible for bringing him hither.

WELLING and others v. CRANE and others.

(Circuit Court, D. New Jersey. September 23, 1884.)

PATENTS FOR INVENTIONS—COMPOSITION FOR ARTIFICIAL IVORY—NOVELTY.

Patent No. 89,531, granted April 27, 1869, to William M. Welling, for an improved composition for artificial ivory, is void for want of novelty, and because it does not disclose an advance in the art.

On Bill, etc. Suit No. 3.

Betts, Atterbury & Betts, for complainant
Rowland Cox, for defendants.

Nixon, J. This suit is brought to recover profits and damages for the infringement of letters patent numbered 89,531, dated April 27, 1869, and granted to William M. Welling, for an "improved composition for artificial ivory."

The defendants contend that the patent is void (1) because it is wanting in novelty; (2) because the specification is fatally defective; and (3) because the patent does not disclose an advance in the art. The patent is for a composition. The patentee claims that he has invented and made a new and useful compound resembling ivory. In the specifications he states that he uses of kaolin, in fine powder, about ten parts, by weight, to one part, by weight, of shellac, also finely ground. After intimately mixing these powders together, by sifting or otherwise, and adding, if desired, a small portion of gum camphor, he passes the product through heated rollers that melt the shellac and produce a plastic mass, which renders the union of the shellac and kaolin so intimate that the mass is homogeneous, and when pressed into molds, while still warm, has the appearance of ivory. Different colors of the article may be secured by adding any desired coloring matter with the kaolin and shellac.

The new composition, for which the patent was granted, consists of a mechanical mixture of kaolin and shellac in certain definite proportions,—the kaolin to give it body, and the shellac to effect an adhesion of the parts. The testimony shows that the use of these ingredients, in combination, was not new. A number of patents were exhibited to prove this. In some of them, kaolin is specifically mentioned as a desirable body-giving agent, in connection with shellac, to impart adhesiveness. In others, "all earths, dried and powdered," "finely powdered porcelain, or other baked earths," "argillaceous earths," and like descriptions of inert materials, are designated, and it will hardly be disputed that all of these substances are equivalents of kaolin. It was no more invention to substitute kaolin for any of these, than to make door-knobs of clay or porcelain, instead of iron, brass, wood, or glass, which has been previously used. See *Hotchkiss v. Greenwood*, 11 How. 248; *Smith v. Goodyear Co.* 93 U. S. 486.

The only questions left in the case are, whether this combination, in the proportions stated in the patent, produced any new and useful result; and, if so, whether the defendants have infringed by using it in these proportions. I think that both of these questions must be answered in the negative, and against the complainants. The weight of the evidence does not give support to the alleged value of the patented composition, except for poker checks and martingale rings. It is not strong enough to be useful in the manufacture of billiard balls, piano keys, knife handles, or any articles which are liable to be cracked or broken by coming in contact with other substances.

It is also quite clear that the proportions mentioned in the patent

do not yield the best results, and that the patentee himself early abandoned their use. He says he does not remember when he quit using two parts of kaolin to one of shellac, but that he ascertained some years ago that, in order to secure a more ivory-like appearance to the manufactured articles in making up the composition, he was obliged to reduce the quantity of kaolin, and to substitute therefor "a lead," and that he varied the proportions so much that in some cases he used equal parts of kaolin and shellac, and in others one part of shellac and from one and a quarter to one and three-quarters of kaolin, and one part of "a lead." It does not appear that the defendants have adhered any more closely to the proportions of the patent than the patentee himself. After full consideration, I am not able to give any construction to the claim of the patent which will constitute them infringers, and the bill of complaint must be dismissed, with costs.

BROWN MANUF'G Co. v. DEERE and others.

(Circuit Court, N. D. Illinois. August 4, 1884.)

PATENTS FOR INVENTIONS—COUPLINGS FOR CULTIVATORS—CLAIM 1 OF PATENT No. 190,816—PATENTABILITY—ANTICIPATION—INFRINGEMENT.

The first claim of letters patent No. 190,816, granted to William P. Brown, May 15, 1877, for an improvement in couplings for cultivators, construed, and held, that Brown's device was a patentable invention, not anticipated by Coonrod's patent of 1867, Stover's patent of 1870, or Haslup's patent of 1872, and was infringed by the device of defendant.

In Equity.

A. W. Train and George H. Christy, for complainant.

West & Bond and Coburn & Thacher, for defendant.

BLODGETT, J. The complainant in this case seeks an injunction and accounting against the defendant for the alleged infringement of the first claim of patent No. 190,816, granted to William P. Brown, May 15, 1877, for an improvement in couplings for cultivators. The patentee states:

"My invention relates to an improved form of coupling for fastening the forward ends of the beams of plows or gangs to the axle of a wheeled cultivator. The improvement consists in the particular construction and arrangement of a tube or pipe-box turning loosely upon the horizontal ends of the crank-axle, and connected through an adjustable stirrup or sleeve and bracket with a head having a long bearing at right angles to the pipe-box, to which head the forward ends of the plow-beams are bolted, while the pipe-box is provided with means for turning it against the gravity of the attached cultivators in the rear, whereby the said cultivators are manipulated with greater ease, as hereinafter more fully described."

The distinctive feature of this device, which is now brought to the attention of the court in this case, is the auxiliary power applied by means of the pipe-box and an arm projecting upward therefrom to

aid in lifting and manipulating the plows by means of a spring attached to the lever or arm, so as to utilize the force of the spring. It is obvious from an inspection of the device as exhibited by complainant's model that some other force may be substituted for the spring. The patentee suggests that this may be done by weights, or by utilizing the draft of the team for the desired purpose. By means of the pipe-box, which rotates loosely upon the horizontal portion of the crank-axle and the stirrup rigidly attached thereto, with a vertical bolt connecting the ends of the plow-beams to this stirrup, and thereby connecting the plow to the axle, a vertical motion of the plow is secured, while by means of the bolt connecting the beams to the stirrup a horizontal motion is given. We have then a plow-beam carrying one or more cultivators attached to the axle of the carriage with a free lateral or horizontal and vertical motion. The plows thus geared to the axle would naturally drag heavily upon the ground, and it requires the exercise of considerable strength on the part of the operator or plowman to handle them, either to throw them out of the ground, raise them up when you wish to turn a corner, or travel from point to point, or even raise them slightly for the purpose of passing over an obstruction. The device in this case is intended to facilitate the raising of the plow for any of the purposes mentioned or desired, and to accomplish this result the arm, M, extends upward from the inner end of the pipe-box to a sufficient height to form a lever designed to rock or roll the pipe-box upon the axle, and the plow, being rigidly attached vertically to the pipe-box by the means described, the hind end is either wholly or partly lifted from the ground, thereby relieving the plowman of a material part of his labor.

The defendant is charged with infringing the first claim of the patent, which is—

"(1) The pipe-box provided with a projection adapted to co-operate with a spring, weight, or the draught, to rock the said pipe-box against or with the weight of the rear cultivators or plow, substantially as and for the purpose described."

In his specifications the patentee, as already suggested, intimates that the draught of the team may be utilized to either lift the plows in the same manner as they are lifted or partly lifted by the spring, or the same force may be applied to hold the plows down and cause them to run deeper into the ground, and this result he proposes to accomplish by providing another projection upon the pipe-box near the hub of the wheel, extending both above and below the center of the axle, which projection he designates as M'. This projection, M', is so arranged as to allow of applying some part of the draught-power of the team by hooking the draught-rod into the lower projection when it is wished to hold the plows down, and into the upper part of the arm, M', when it is desired to have the power operate against the gravity of the plow. Much discussion was had upon the hearing as to the construction to be given to this claim, the defendant's counsel

and experts contending with much ingenuity and acumen that the words "against or with the weight of the rear cultivators or plows" should be read "against and with the weight," etc. To my mind there is no ambiguity or uncertainty in this claim. This inventor thought at least that both the methods of utilizing the devices for rocking the pipe-box upon the axle were new, and he sought in this claim to cover, as it seems to me, both the arm, M, and the arm, M', for the purposes to which he intended to apply them. It is manifest to my mind that the projection adapted to co-operate with a spring, mentioned in the first and second lines of the claim, is the arm, M, and that in this claim, as well as in the specifications generally, when the patentee talks of a projection intended to co-operate with a spring or weight he has reference to the arm, M, which he specially designs for that purpose. He, however, wished to preserve the benefit of the projection, M', if it should be found practically useful, and hence made his claim comprehensive enough to cover that part of his invention. It is obvious that the arm, M, and spring, N, as shown in the drawings and model, can only operate to rock the pipe-box against the weight of the plow, or, in other words, to help lift the plows from the ground. It is equally obvious that by reversing the spring and attaching it to the rear of the arm, M, it would operate with the gravity of the plows and aid in holding the rear of the plows upon the ground; but the only suggestion made in the specifications of a mode for rocking the pipe-shaft backward, so as to hold the plows more firmly upon the ground, is by means of the arm, M', and there is nothing in the proof tending to show that this special device has been found useful or adopted in practice. It seems to me that whatever allusion there may be in this first claim to this arm or projection, M', may be considered as coming within the well-known maxim in pleading "*Utile per inutile non vitiatur*,"—that which is serviceable is not rendered invalid by that which is useless. Whatever part of this claim may be deemed to have reference to the projection, M', it seems to me is of no moment, for the purposes of this case, at least, for it is not claimed that defendants use this part of this claim or anything equivalent to it. The prominent feature of this device as described in this claim is the pipe-box, arm, M, and spring, to aid in lifting the rear of the plow, and the claim seems to me to sufficiently cover and clearly describe this portion of the device.

The defendant further insists that this first claim is void because the matter thereof is old, and had been anticipated in prior devices and patents upon the same subject. Without analyzing the characteristics and features of a large number of prior patents put into this case, several of which show some elements used in complainant's organization, it is sufficient to say that the Coonrod cultivator of December, 1867, and the Stover cultivator of November, 1870, both show pipe-boxes so working on an axle as a means by which a plow-beam is attached to the axle of a cultivator carriage so as to secure

vertical motion. It is conceded by the complainant that Brown substantially began where Stover left off,—that is, Stover had attached the end of his plow-beam to the axle through the instrumentality of a pipe-box, which rocked or worked upon the axle, thereby allowing a vertical tilting motion to the plow-beam; but I do not find in any of the numerous patents cited any suggestion of the peculiar auxiliary means of assistance for raising the rear of the plows out of the ground, such as is shown in Brown's device in this patent. It is also true that the Haslup patent of 1872 shows a pipe-box on the axle, with an arm or lever, O, extending upward from the pipe-box, by which the driver could raise the plows from the ground; but that was a riding cultivator, and the function of the lever was different from that of Brown's projection. So, also, it appears from the proofs that prior to the patent now under consideration one or more devices had been patented or put in public use for using a spring or other equivalent force to aid in raising the rear of the plows out of the ground; but the attachment for that purpose was made upon the beam or handle back of the joint where the plow was connected with the axle, and was practically of but little use, because, as the plows swayed out of the line of draught in either direction for the purpose of following a crooked row of plants, or of avoiding plants out of the line, or for the purpose of avoiding an obstruction, the spring worked against the strength of the plowman, and he was obliged, in order to change the direction of his plows, frequently to overcome the force of the spring, which became a serious objection in practical tilling. This patentee, however, applied the lifting lever by which the plows were raised out of the ground practically to the end of the plow-beam, because the projection, M, and the plow-beam being both for the purpose of vertical motion rigidly attached to the pipe-box, the rocking of the pipe-box by the projection or lever, M, tilted or lifted the rear of the plows without in any manner interfering with the side or horizontal action of the plows.

It is argued that the attachment of the lifting force to the end of the plow-beam by means of the lever, M, has in it nothing new or patentable, when we consider that the lifting force of the spring or weight had, before this inventors' present patent, been applied at a point behind the end of the beam; but this, it strikes me, is one of the cases where the change in the location of the lever makes this device a success where prior efforts in the same direction had been failures. The fact that not only the defendant in this case but other large manufacturers of cultivators have at once adopted, substantially, the same auxiliary lifting device shown in the complainant's patent, is evidence of the popular acceptance of this as the practical solution of many of the difficulties which had been encountered in the attempt to use the older devices, and is such a change and improvement as required more than mere mechanical skill, and brings this device fairly within the domain of the patent law.

I do not, therefore, find in the older devices anything which seems to me to have anticipated or suggested this device. The Stover device became known in 1870, and yet for nearly seven years afterwards no such step was made as is shown in complainant's patent. So, too, this same patentee, Brown, in 1872, instructed the world how to apply the lifting force of a spring or weight to aid in raising the rear of a plow by means of an attachment upon the body of the plow behind the coupling, but no one was instructed by either Stover or the Brown device of 1872 to apply the lifting force at the end of the plow by means of a lever projecting upward from the end of the beam; and the fact that these older devices, which it is now claimed were susceptible of being modified by mere mechanical skill into a machine in its operation and effect like that shown by the complainant's patent, rested without any such modification until the present patent was promulgated, is quite conclusive proof to me that it required something more than mere mechanical skill to produce what is shown in this patent. By the patent now under consideration the patentee made an improvement in advance of what he had done by his patent in 1872, and immediately upon the advantages of this later device being exhibited to the public the defendant and other manufacturers have seized upon it as meeting a felt want, and assumed to appropriate it to their own use.

The defendant further contends that it does not infringe this patent; but I find in its device—*First*, the pipe-box adjusted to rock upon the horizontal portion of the axle; *second*, in all its essential elements of function and operation the stirrup by which the pipe-box is fixed to the end of plow-beam; and, *third*, the arm or projection, M, extending upward from the pipe-box so as to form a lever by which the pipe-box may be rocked upon the axle, and thereby aid in lifting the rear of the plow from the ground. I do not find in the defendants' structure the auxiliary or incidental projection, M', described in the complainant's patent, but, as I have already said, I do not think that the failure to use this portion of the complainant's device authorizes or makes it allowable to use what I deem the essential element of the complainant's patent,—the pipe-box mode of attaching it to the plow-beam and projection, M, or its equivalent.

I therefore find that the defendants infringe the first claim of the complainant's patent, and that the complainant is entitled to damages, and accounting therefor.

BROWN MANUF'G Co. v. BUFORD and others.

(Circuit Court, N. D. Illinois. August 4, 1884.)

PATENTS FOR INVENTIONS—PATENT No. 190,816—CLAIMS 1 AND 2—INFRINGEMENT.

The defendant's cultivator compared with patent No. 190,816, sustained in *Brown Manuf'g Co. v. Deere*, ante, 709, and held, that the first and second claims thereof are infringed by defendant.

In Equity.

A. W. Train and George H. Christy, for complainant.

West & Bond and Coburn & Thacher, for defendant.

BLODGETT, J. In this suit the defendant was charged with the infringement of letters patent No. 190,816, dated May 15, 1877, issued to William P. Brown, for an improvement in couplings for cultivators. I have already discussed, in the case of the *Same Complainant* against *Deere & Co.*, ante, 709, all the questions made in this case except that of infringement. In this case the defendant is charged with infringing the first and second claims of this patent, which are as follows:

"(1) The pipe-box provided with a projection adapted to co-operate with a spring, weight, or the draught, to rock the said pipe-box against or with the weight of the rear cultivators or plows, substantially as and for the purpose described. (2) The combination, with the crank-axle and the gangs or plows, of the pipe-box, having arm, M, the spring, N, attached to the main frame, the head, I, and the stirrup, G, or its equivalent, having brackets, H, and pivot-bolt, b, and fastened to the pipe-box, substantially as and for the purpose described."

I find in the defendant's cultivator a pipe-box substantially the same in its function and operation as that provided in complainant's patent, to which I also find a plow attached by means of a bracket cast upon and as a part of the pipe-box; and this bracket seems to me in every particular to take the place and be the equivalent of the stirrup, G, shown in the complainant's patent. It performs the same function in the mechanism, and does in every particular the same work as the complainant's stirrup. The plow has, by means of the pipe-box, and the bracket or stirrup and coupling-pin, the same side and vertical motion which are given in the complainant's patent, and which are the purpose and object of this complainant's device. I also find a projection, not cast upon and made an integral part of the pipe-box, as is complainant's projection, M, but a vertical projection which is rigidly attached to the end of the pipe-box, and performs the same function, and operates in the same manner and for the same purpose, in connection with a spring, as the arm or projection attached to the complainant's pipe-box. The mere fact that this projection is constructed separately from the pipe-box and then rigidly attached thereto, does not, it seems to me, in any degree justify the defendant in the use of this device. It seems to me a clear

and palpable infringement of that portion of the complainant's patent which provides for an auxiliary force with which to aid in lifting the rear of the plows out of the ground. The curved lever of the defendant is in all its essential functions but the projection, M, of the complainant's patent, and I cannot see that it performs any other or different function in the defendant's organization from what would be performed by the complainant's arm, M, in the same organization.

There will, therefore, be a finding that the defendants infringe the first and second claims of the plaintiff's patent, and a decree for an accounting and injunction.

STEPHENSON v. THE FRANCIS.

(District Court, S. D. New York. September 16, 1884.)

1. MARITIME LIEN—SUPPLIES—CHARTER—PART OWNERS IN DIFFERENT STATES.

Where a ship is run by charterers, being owners *pro hac vice*, their residence only is regarded in determining the ship's "home port," and the presumptions of personal credit in regard to supplies furnished.

2. SAME—SUPPLIES—WHERE FURNISHED.

If there are several equal co-owners, general or special, resident in different states, no lien will arise for supplies furnished in the state of the known residence of either.

3. SAME—PERSONAL CREDIT—IMPLIED LIEN.

A known owner obtaining supplies on his personal order in a foreign port, not being master, deals presumptively on his personal credit only, and no lien will be implied unless the libellant satisfies the court, from the negotiations or the circumstances, that there was a common understanding or intention to bind the ship.

4. SAME—PRESUMPTION—CHARGE ON LIBELANTS' BOOKS.

This presumption is stronger in the case of a charterer known to be bound to pay for the supplies in person, and not to charge the ship; and where material-men, knowing the above facts, furnished supplies to such a charterer on his own application, who was known to them for 25 years previous, but having no definite credit with them, and no reference was made to the ship as a source of credit, and the master gave notice that the ship was not to be bound, and the ship was not in any port of distress, and the libelants being agents to collect the freights, and other circumstances negativing a reliance on the ship, *held*, that supplies to a small amount, for the vessel's ordinary trips, at the commencement of season's business, were furnished on the charterer's credit only, notwithstanding a charge on the libelants' books to the vessel and owners, and without reference to the question of the *power* of a charterer to bind the ship for supplies, contrary to the stipulations of the charter.

5. SAME—KNOWLEDGE OF OBLIGATION OF CHARTERERS—NOTICE.

The libelants, knowing the charterer's obligation to the general owners to obtain ordinary supplies on his own responsibility only, were bound in good faith to make known their dissent when he applied for supplies, if they meant to hold the ship; not having dissented then, they must be held to have acquiesced in his application in conformity with his obligation, and are estopped from afterwards asserting the contrary.

6. SAME—NOTICE TO MASTER—SUBSEQUENT SUPPLIES.

Notice by the master is one of the terms on which subsequent supplies must be held furnished.

In Admiralty.

Libel to recover an unpaid balance of \$322.56, for coal supplied by the libelants at Washington to the steamer Francis; this part of the bill being furnished from July 15 to July 18, 1879. The Providence & Stonington Steam-boat Company, a Rhode Island corporation, were the general owners of the steamer, and appeared and defended as claimants.

On June 30, 1879, the Francis was chartered to "Thomas Collier, of Brooklyn, N. Y., and Jos. L. Savage, of Washington, D. C.," for 90 days, for service between New York and Washington. By the terms of the charter the possession of the vessel and the control of her navigation were in the charterers exclusively; and it was thereby agreed that they should "pay all the vessel's running expenses, including * * * fuel, oil, etc., and all other expenses connected with the navigation of the steamer."

Under this charter various trips were made between New York and Washington under the direction of the charterers. The coal was all delivered to the steamer upon the personal order of Mr. Savage, one of the charterers, who was in Washington, and had been known to the libelants for 25 years. One of the libelants testified that Savage informed him a few days before the arrival of the steamer that he would want coal for her when she arrived; and that Savage either then, or shortly after her arrival in Washington, told him that he had chartered her. Nothing further was said as to the credit for the coal, and no inquiry was made as to the terms of the charter. None of the coal was purchased by the captain, or procured by his order, or through his agency. The captain testified that on July 15th he notified the libelants that by the charter the charterers were bound to pay for supplies, and that the vessel would not be liable; and he cautioned them to look out lest they had trouble in getting their pay. On that day the libelants got a payment of \$115.44 from Savage, and furnished supplies amounting to \$149. On the next trip they refused to supply coal unless some further arrangements as to paying them were made; and the departure of the steamer was in consequence delayed several hours. They did, however, ultimately furnish coal for that trip to the amount of \$207.50, which is included in the present bill. What, if any, arrangement was made to pay them does not appear. But at some time they were made agents of the steamer for the collection of her freights in Washington, and as such agents they made collections which they did apply. On the twenty-sixth of July they refused to furnish any more coal on Savage's order, and the captain obtained from them what was needed for that trip to New York by a personal draft on the claimants' agent, which was honored. The coal was charged against "the steamer or owners," and one of the libelants testified that he sold the coal on the credit of the ship, and that the captain did not notify him of the terms of the charter, or that the vessel would not be liable.

Beebe & Wilcox, for libelants.

Miller, Peckham & Dixon, for claimants.

BROWN, J. The libelants claim a maritime lien upon the steamer for coal furnished in Washington. By the law of this country no maritime lien is allowed for repairs and supplies furnished to a vessel in her home port, *i. e.*, within the state of her owners' residence. The supplies in that case are conclusively presumed to have been furnished on the owners' personal credit, and not on the credit of the ship. Where the vessel is known to be under the control of charterers that are in the situation of owners *pro hac vice*, *i. e.*, are running the vessel upon their own account, their residence alone is looked to in determining the question of lien, since they are the only parties who are personally bound for supplies, and the only persons standing in the situation of owners, to whom credit can be presumed to be given. Supplies furnished in the state of the residence of such special or *quasi* owners are therefore presumed to be furnished upon their personal credit only, and the ship will not be bound. *The Golden Gate*, 1 Newb. 308; *The Norman*, 6 FED. REP. 406.

Where there are several part owners, general or special, residing in different states, I doubt whether any single rule can be adopted justly applicable to all cases. As the reason for denying a lien is the personal credit presumed to be given to the owners at their place of residence, the reason of the rule would seem to demand its application in all the states in which any of the owners reside that are known, or ought to be known, to those who furnish supplies. Such is the view expressed by HAMMOND, J., in the case of *The Rapid Transit*, 11 FED. REP. 322, 328-330.

In the case of *The Indiana*, Crabbe, 479, repairs were furnished in Philadelphia to a vessel wholly owned and registered in New Jersey. One-sixth of the vessel was sold to a resident of Philadelphia, who was then made managing owner, and a new registry of the vessel was taken out in Philadelphia; and the repairs were afterwards continued under the direction of the resident managing part owner. It was held, and it seems to me justly, that a maritime lien accrued for the repairs prior to the sale of the one-sixth, but not for the repairs that were subsequent thereto. On the other hand, if the owners of a domestic vessel hold her out as a foreign ship, supplies furnished upon the faith of the foreign ownership will be a lien, the owners being precluded from taking advantage of their own misrepresentations. *St. Jago de Cuba*, 9 Wheat. 416, 417; *The Nestor*, 1 Sumn. 75; *The Mary Chilton*, 4 FED. REP. 847. On the same principle, it seems to me, the mere residence within the state of a part owner that is unknown to the material-man, ought not to debar the latter of his lien when the vessel is registered in a different state, and the managing owner is known to reside there, and the vessel, by the name painted on her stern, apparently belongs there. Such circumstances, taken together, in the absence of notice to the material-

man of any part owner within the state, might be reasonably held, in favor of those furnishing supplies, to be practically a representation of the foreign character of the vessel, and of the foreign residence of her owners, so far as it affects a lien for supplies furnished on the faith of that fact. *The Jennie B. Gilkey*, 19 FED. REP. 127. But when two equal part owners, general or special, reside in different states, and the residence of both is known to those who furnish supplies in either state, the presumption of personal credit must apply within one state as much as within the other. Hence no lien could logically arise in either state, unless the place of the registration of the vessel were to control; and it is well settled that the place of registry is immaterial, where the actual residence of the owner is known. *The E. A. Barnard*, 2 FED. REP. 712, 716; *The Mary Chilton*, 4 FED. REP. 847; *The Golden Gate*, Newb. 308-310.

In the present case, it appears that Mr. Savage was well known to the libelants in Washington. If it were also clear that his residence was there, that fact would, consequently, require the dismissal of the libel. But both the pleadings and the evidence leave this fact undetermined. The answer alleges a charter of the vessel to Collier and Savage, "of the city of New York." The charter party introduced in evidence describes Savage as "of Washington, D. C." The libelant claims the right to rely upon the inference from the answer that both charterers resided in the state of New York. The oral testimony shows nothing concerning the actual residence of Savage, although the language of the charter-party, his presence in Washington during all these transactions, his being known to the libelants there for 25 years, and his personal order of all this coal, would afford a natural inference that his residence was there. But where the actual residence of a party is an essential condition of recovery, the description of him as "of a certain state," etc., has been repeatedly held insufficient. *Wood v. Wagon*, 2 Cranch, 9; *Brown v. Keene*, 8 Pet. 112; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Robertson v. Cease*, 97 U. S. 646; *Grace v. The American, etc.*, 3 Sup. Ct. Rep. 207.

Under the allegation of the answer, and the indefiniteness of the evidence as to Savage's residence, I do not feel warranted in determining the case on the ground of the supposed residence of Savage in Washington.

The other defenses are that the supplies were furnished upon the personal credit of the charterers; and that the latter had no power to bind the ship. There is a direct contradiction between the libelants and the captain as to his alleged notice to them on July 15th, that, under the charter, neither the vessel nor her owners were to be responsible for coal; but the libelant's subsequent conduct in refusing to supply coal until some further arrangements were made for payment, and until some money was paid them, the delay of the vessel's departure in consequence, and the subsequent refusal altogether to furnish coal on Savage's order, fall in so naturally with the captain's

testimony as to confirm his narrative. The credits on the bill are sufficient to pay for the coal furnished before July 15th, when the captain testifies that his notice was given.

The most important facts bearing on this branch of the case are the following: (1) The charterers were owners *pro hac vice*, and had expressly agreed to pay for such supplies, as one of the conditions of the charter; (2) the libelants, before furnishing that part of the bill now in suit, not only knew that Savage was running the vessel under a charter, but, as I think, were cautioned by the master that the ship was not to be held liable; (3) all the coal was furnished upon the personal order of Savage, one of the charterers, at what appears to have been at least his place of business, or one of his places of business; (4) in ordering and in supplying the coal, there was no intimation by either party to the other that the ship was to be bound; (5) the captain was in no way instrumental in procuring the coal, but, as I must hold, gave notice that the ship was not to be held; (6) the ship was not in any port of distress, or upon a voyage partially accomplished; the supplies were furnished at one of her ordinary ports of departure, in the course of her ordinary business, and in the presence of, and under the management of, one of her special owners.

I have found no case where, upon facts like these, a maritime lien has been sustained. There seem to me to be several grounds upon which the lien here claimed must be denied: *First*, because supplies furnished to an owner in person, not being master, though in a foreign port, are presumptively furnished upon his personal responsibility only, where, as here, there is no reference made in the negotiations between the parties to the ship as a source of credit, and no other circumstances clearly indicate such a common intention; *secondly*, because this presumption of a personal credit only in dealing with the owner is stronger where the material-man deals with a known charterer or special owner that is known to be bound to pay for the supplies himself, and is known to be bound not to charge the ship, the supplies being in the ordinary course of the ship's business at one of her regular ports of departure, and not in any port of distress, or under any circumstances that render it necessary for the vessel to continue her trips at the ship's expense; *thirdly*, because, in the absence of any necessity for the ship to continue her regular trips, good faith to the general owner, without which no lien will be upheld, does not permit the material-man to supply materials for such trips at the ship's expense, contrary to the known terms of the charter; and, *finally*, because the notice from the captain to the libelants that the ship was not to be bound, became one of the terms of sale that could not be disregarded by the libelants, upon which the materials subsequently supplied must be deemed to have been delivered.

When a known owner, not being master, procures necessary repairs or supplies in a foreign port, the question whether a maritime lien, *i. e.*, an implied hypothecation of the ship, arises therefor, must

depend upon the intention of the parties, to be gathered from all the circumstances of the transaction. *The Rapid Transit*, 11 FED. REP. 329; *The Jeanie Landles*, 17 FED. REP. 91. This is also true, doubtless, as a general proposition in reference to supplies procured on the order of the master. But there is an important difference in the two cases. When the supplies are ordered by the master, in the absence of the owner, there is presumptively a necessity for a credit of the ship to obtain them; because in a foreign port, and in the owner's absence, the master is presumably without other means; and no implied lien is ever allowed unless there be, either in fact or by presumption of law, not only a necessity for the supplies themselves, but also a necessity for the credit of the ship to obtain them. *Pratt v. Reed*, 19 How. 359; *The Grapeshot*, 9 Wall. 141; *The Lulu*, 10 Wall. 192; *Thomas v. Osborn*, 19 How. 22; *The Neversink*, 5 Blatchf. 541. But there is no presumption of law that an owner, because he is in a foreign port, including in that designation the different states of this country, is without means, reputation or credit, and has no other resource but the ship to obtain needed supplies. The reason for the *prima facie* presumption in the case of supplies ordered by the master in a foreign port does not apply, therefore, where the owner is present and orders the supplies in person; and hence no such *prima facie* presumption in the latter case has ever been recognized. Maritime liens for repairs and supplies, being secret incumbrances, are not favored. They are allowed only upon grounds of commercial convenience and necessity. In the state of the owner's residence, where he is presumptively present, or within easy communication, no mere maritime lien for repairs and supplies there furnished is by our law in any case allowed. In that case the presumption of law is conclusive that the owner or his representative is within reach; that he is able to supply his ship upon his ordinary responsibility; and that he intends to do so without burdening her with secret liens. In a foreign port, when the owner is present and procures the supplies in person, not being master, in the absence of any express reference to the ship as a source of credit, the same presumption as to the owner's means and as to his intention exists *prima facie*; but this presumption is not conclusive, as in the home port, and may be repelled by proof drawn either from the express language of the parties, or from any other circumstances satisfactorily showing that a credit of the ship was within the common intention; and when this intention appears, the lien will be sustained. This is allowed because even an owner in a foreign port may be without means, reputation, or credit, and hence may be under the same necessity as the master for making use of the credit of the ship. But, as I have said, this necessity in the case of an owner is not presumed. It must appear in proof, either from the circumstances or from the terms of the negotiation, which may afford conclusive evidence both of the intent and of the necessity. It is only when the material-man deals with the master,

or the ship's agent, or some officer of the ship by the master's sanction or acquiescence, that he deals presumptively with the ship herself, and sells to the ship upon her credit. In other cases, the common intent to charge the ship must be shown.

The above principles have been repeatedly affirmed and applied in the earlier and in the more recent decisions of the supreme court. In *The St. Jago de Cuba*, 9 Wheat. 409, the court say:

"The vessel upon an unfinished voyage must get on. This is the consideration that controls every other; and not only the vessel but even the cargo is *sub modo* subjected to this necessity. For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material-men to the office of ship-master, and considers the owner as vesting him with those powers by the mere act of constituting him ship-master. The necessities of commerce require that, when *remote from his owner*, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. *But, when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.*"

Judge CONKLING, in his treatise on Admiralty, (page 80,) says: "To guard against possible misapprehension, it is proper to state that no lien is ever *implied* from contracts made by the owner in person;" quoting the language of the case above cited.

In the case of *Thomas v. Osborn*, 19 How. 22, TANEX, C. J., in a dissenting opinion, refers *arguendo* to this point as clearly settled in the marine law of this country: "If Leach," [charterer and captain,] he says, "is to be regarded as owner for the time when he was sailing the *Laura* under the agreement, then, by the maritime law, the repairs and supplies furnished at his request are presumed to have been furnished upon his personal credit, unless the contrary appears." Page 38. And at page 43 he says again: "But if the owner is present, and they [the supplies] are furnished to him, it is equally well established that the credit is presumed to have been given to him personally, and no lien on the vessel is implied." On one part only of these propositions was any qualification placed by the judgment of the majority of the court; viz., that, when the owner is also captain, supplies furnished on his order will be deemed furnished to him in his character as captain, rather than in his character as owner. Page 29. But this very distinction clearly sustains the general doctrine above stated, else there would have been no reason for distinguishing between the character of Leach as captain and his character as owner. In that case, it will be observed, the supplies were furnished not only in a foreign port, but in a very remote one, viz., Chili; and yet this *prima facie* presumption is stated as the settled law.

In all the reported decisions where a lien has been sustained for supplies ordered by an owner in person in a foreign port, the court has found an intent by both parties that the ship should be charged,

and has placed the decision expressly upon that ground. In the cases of *The Kalorama* and *The Custer*, 10 Wall. 204, the court upheld the lien because there was an "express understanding that the repairs were made and furnished on the credit of the steamer." Pages 214, 217. In the case of *The James Guy*, 1 Ben. 112, BENEDICT, J., finds that the parties had "an agreement based upon the credit of the vessel," and "that the responsibility of the boat for the bill was a feature in the transaction recognized by both parties at the time of contracting the debt." NELSON, J., in affirming the judgment, says: "After a full examination of the evidence I am satisfied that it was the intention of both parties * * * that the mechanic or workman should look to the vessel as his security." So, in the case of *The Union Express*, 1 Brown, Adm. 537, the court finds that the libellant made the advances "upon an express understanding and agreement for a lien;" and in *The Sarah Harris*, 7 Ben. 177, it was only "in connection with all the evidence" (page 180) that BLATCHFORD, J., found that a credit to the vessel was made out. The case of *The Patapsco*, 13 Wall. 329, has nothing adverse, and is not in point. The charter was there unknown to the libellants. The charterers were a distant, foreign, and insolvent corporation, and the coal was supplied upon the requisition of the engineer of the ship and the order of the agent. The court considered the case a difficult one, but found, on the whole, that the coal should be deemed, under the circumstances, to have been furnished on the credit of the ship; observing that "the company running the steamer was a distant corporation of no established name, and without personal liability in case their enterprise should prove a failure." That case, however, was not one of an owner present, and ordering the supplies in person.

If such is the rule of law as regards the general owner ordering supplies in person in a foreign port, the reasons for this rule are still stronger in the case of a mere owner *pro hac vice*, or known charterer, who has bound himself to pay for all such supplies personally, and who has no right, as against the general owner, at least, except in case of actual necessity, to navigate the ship at her expense. As the purchase in this case was by the special owner in person, the burden of proof was, by all the above authorities, upon the libellants to satisfy the court, as in the cases above cited, that it was the intention of both parties that the ship should be bound for the coal furnished. Nothing, however, appears in the evidence indicating any such common intention. A mere charge to the ship on the libellants' books is an inconclusive circumstance, even as regards the libellants' own intention. *Beinecke v. The Secret*, 3 FED. REP. 667. The usual practice of merchants to make such charges against the vessel indifferently, whether the vessel be in her home port or not, shows that such a charge is very slight, if any, evidence of an actual reliance on the ship. In practice it is scarcely more than a habit adopted by merchants in order that their books may not tell against them, if,

in fact, they would be entitled to hold the ship. But when nothing on that subject is spoken of between the parties, a mere secret intention of the material-man to charge the ship, in no way communicated to the owner at the time, can have no weight as evidence of the common intent. The question is, what did the conversation of the parties or the circumstances of the transaction authorize the libelants to understand as the basis of furnishing the supplies? In some cases a few words or slight circumstances may clearly indicate the common intention. If an owner seeks supplies of an entire stranger in a foreign port, something will almost necessarily occur in the ordinary course of business to indicate whether the intention is to rely on his personal credit or on that of the ship also. If such an owner should say, "I am a stranger to you, but you can trust the ship," or, "You have the security of the ship," no question could arise that a lien would be implied. If such an owner, on the contrary, should give references as to his responsibility, and opportunity for inquiry, and inquiries were made and supplies afterwards furnished without any allusion to the ship as security, it is equally clear that no inference of a common intention to procure supplies on the credit of the ship could be sustained. In the present case, Savage, one of the special owners, was not a stranger to the libelants. He had been known to them for 25 years. He applied to them several days before the steamer first arrived, and told them, not that the ship would need supplies, but that *he* should want coal for the steamer. No allusion was at any time made to the steamer as a source of credit. On the contrary, the libelants were told either then, or when the steamer arrived, that she was run under charter. The libelants, from knowledge of that fact alone, could not have failed to understand, as business men, that the charterers, and not the owners, were bound to pay for the necessary supplies for her ordinary trips in running between New York and Washington. The urgent means resorted to by the libelants to compel payment by Savage while the bill was still quite small; their refusal to supply coal unless payments on account were made; the delay of the vessel's departure in consequence; their obtaining the agency for the collection of freight; and their final refusal altogether to furnish more coal,—are all opposed to a reliance on the credit of the ship.

Again, this case was not one of any actual maritime necessity, such as that of *The City of New York*, 3 Blatchf. 189, where, as NELSON, J., finds, the vessel was in a port of distress, on an unfinished voyage; and where, consequently, the interests of the general owners required that the ship should be hypothecated, if necessary, in order to complete her voyage, and thereby cancel her own obligations and the liens of freighters to a much greater extent than the mere cost of the needed supplies. See, also, *The Monsoon*, 1 Spr. 37. Here the supplies were in the usual course of navigation, from one of the specified ports of departure named in the charter; they were supplies that

were plainly within the express contemplation of the charter, and for which it was specially agreed that the charterers should *pay*, for the very purpose of preventing the ship from being burdened with them. Not only were the libelants put upon inquiry so as to be chargeable with knowledge of these facts through their information at the outset that the vessel was run under charter,—a fact which would, itself, naturally import all the above provisions,—but they were, as I think, specially cautioned by the master on this subject. This knowledge and these cautions make their subsequent conduct natural and consistent. They explain the urgent means to which the libelants resorted to compel Savage to pay as he went along, though the bill for coal was yet small; their refusal to supply coal except on partial payments; the consequent delay of the steamer's departure; their appointment as agent to collect the freights; and their final refusal to supply coal at all except for cash on delivery. These circumstances are not consistent with a reliance on the steamer for their payment, or with any belief on their part that they had a right to look to her as security for the debt. Moreover, had either the libelants or Savage, at that time, had any idea that the ship was to stand as security for such supplies, it is almost incredible that, in the interviews with him during the troubles and delays above referred to, no allusion to that security should have been mentioned; nor would the libelants naturally have waited nearly 15 months before libeling the ship for payment. The libelants testified that Savage had not had any credit with them. By this I understand credit in the ordinary sense of merchants, *i. e.*, for any definite or considerable period. There was not any definite credit. They could sue him at any moment. They expected payment to be made by Savage speedily, from trip to trip, and they became agents of the freight as a means of securing payment. They would trust Savage and his new enterprise for a few days, and for a small amount, but no further; and hence, after a little, they refused any further trust, and demanded payment on delivery. The circumstances, altogether, both affirmatively and negatively considered, show clearly, as it seems to me, that it was fully understood and recognized by both parties that Savage, in ordering the coal, was ordering it on his personal account, and on the credit of his enterprise, not on the credit of the ship. The express terms of the charter bound him to do so; the libelants knew it. And, when he ordered the coal in person, the legal presumption is, where nothing to the contrary appears, that he ordered it in conformity with, and not in violation of, his known obligations to the general owner. The libelants, knowing these facts, and furnishing the coal without any claim at the time of the security of the ship, must be held to have acquiesced in supplying it according to the known obligation of the charterer, and according to his evident intention, *i. e.*, on his personal credit only. Where material-men furnish ordinary supplies to a known charterer in person, who is running a vessel upon short

trips, and they know, or are chargeable with knowledge of, his obligations to the general owner to pay for the supplies himself and not to charge the ship therefor, it seems to me but reasonable to require that the material-men, if they do not mean to furnish supplies except on the credit of the ship, should, at least, make that fact known, unless other circumstances make the common intent so clear as to dispense with the need of any express mention of this source of credit. No such circumstances here exist. The supplies were furnished at the beginning of a season's run. The material-men contemplated a season's business with the ship. Knowing that she was run by a charterer, they could not reasonably have imagined that the vessel was to be run through the season at the ship's expense; and there was no reason why she should be held for either of these trips' supplies any more than for the whole season's supplies, if the charterer did not pay for them as he went along. A good business reason existed for the libelants' not mentioning any claim of credit to the ship, viz., because, if that had been done, Savage would doubtless have gone elsewhere for his coal, as his known duty to his general owner would have required him to do. Not having made any claim of credit to the ship at the time, when good faith to Savage and to the general owners required the libelants to make this condition known in case they intended any such credit as a condition of furnishing the coal, they should be held estopped from asserting this claim afterwards.

Again, the ship in this case was under no necessity of proceeding upon her new trips, for which this coal was furnished. Savage, by his charter, had no right to pursue her ordinary navigation at the ship's expense. If he could not fit her out for her trips without resorting to her own credit, having no right to use that credit for ordinary supplies, it was his duty to surrender her, or, at least, not to run her until he could arrange to do so without a violation of his agreement with the owner. There was no commercial necessity that she should depart upon this trip; and the general owner had no interest that she should be navigated except according to the terms of the charter. In this respect the case is wholly different from that of *The City of New York*, 3 Blatchf. 189, where the vessel was in a port of distress, on an unfinished voyage, and where the interest of the ship and of her general owner also required the supplies. Broadly considered, therefore, the first requisite for a lien, viz., a necessity for the supplies, did not exist. Had Savage, being under no necessity to continue the vessel's trips, and not being in any port of distress, expressly contracted for ordinary supplies on the ship's credit, this would have been a clear wrong to the general owner, and a violation of the terms of the charter, because the stipulation of the charter was for the very purpose of preventing this. The language of the supreme court in the case of *Gracie v. Palmer*, 8 Wheat. 605, 639, would in that case seem to be applicable. "The charterer," the court say,

"has contracted with the shipper [here the material-man] to do an act which he could not perform without violating his own contract with the ship's owner; and he must therefore be considered as having entered into a contract subordinate in its nature to that previously existing between the owner and charterer." And this was approved in *The Freeman v. Buckingham*, 18 How. 182. In the case last cited CURTIS, J., also expressly limits the effect of the ordinary maritime usages to "contracts * * * entered into with a person who has no notice of any restriction." Page 490. But, in the present case, Savage clearly had no intention of violating the charter, or of obtaining supplies on the ship's credit, and the question of his power does not, therefore, properly arise in this case. The notice, moreover, given by the captain to the libelants, was of itself one of the terms upon which the coal was supplied. The captain is the person who in a foreign port specially represents the ship and all interests combined. When he gives notice that the ship is not to be bound for supplies, that becomes one of the terms on which any supplies subsequently delivered must be deemed furnished, and which estop the material-man from asserting the contrary. Considering the knowledge of the charter that the libelants possessed, as well as this notice from the captain, and the fact that the supplies were for the ship's ordinary use, and not under the stress of any maritime necessity, or in a port of distress, the obligations of good faith, without the observance of which no lien is sustained, estop the libelants from asserting any credit to the ship, or holding her answerable. *The Lulu*, 10 Wall. 201; *Thomas v. Osborn*, 19 How. 46; *The Neversink*, 5 Blatchf. 541; *The Grapeshot*, 9 Wall. 141; *The Woodland*, 7 Ben. 120; *The Columbus*, 5 Sawy. 487; *The S. M. Whipple*, 14 FED. REP. 354; *The Wm. Cook*, 12 FED. REP. 919.

There being apparently some differences in the views expressed in recent cases in the circuit court of this district, as regards the power of a charterer to charge the ship for supplies contrary to his stipulation in the charter, (*The Secret*, 15 FED. REP. 480, followed in *Beinecke v. The Secret*, and *Maxwell v. The Same*, 8 FED. REP. 665-667; *The India*, 16 FED. REP. 262,) although possibly these differences may be harmonized by the distinction between supplies furnished in the ordinary course of navigation and those furnished under circumstances of actual necessity, as in a port of distress, like the case of *The City of New York*, *supra*, I make no reference to the mere question of the charterer's power, but place my decision exclusively upon the grounds above mentioned, viz., the dealings with the charterer in person, and the absence of any understanding or agreement for a credit of the ship; and upon those grounds the libel must be dismissed; but as the case presents features of uncertainty on the pleadings, as well as on some of the facts, the dismissal will be without costs.

See *The Gen. Meade*, 20 FED. REP. 923.

BRIGGS v. DAY and others.

DAY and others v. THE H. W. HILLS.

(District Court, S. D. New York. July 23, 1884.)

1. COLLISION—TUG AND TOW—OBSCURATION OF LIGHTS.

A tug is bound to keep her colored lights in such a position that her tow will not obscure them, as respects vessels at a distance requiring the notice which the colored lights are designed to afford.

2. SAME—LOOKOUT—MUTUAL FAULT.

Where the tug T. had on her starboard side the barge M. in tow, loaded with railroad cars, partly sheltered by a narrow fore and aft roof called an umbrella, which was of such height as to obscure the tug's green light as she was going up the North river, and the steamer H., crossing the river to the northward and seeing no colored light, supposed the T. was going down river instead of up river, and ported so as to go astern of the T., as she supposed, but too late discovered the error and came in collision, *held*, that the collision was caused in part by the obscuration of the green light, for which the T. was responsible. *Held*, that the H. was also in fault for want of any proper lookout, when going at the rate of 13 miles in crossing the river, as such a lookout might have discovered that the T. was going up river in time for the H. to avoid her.

3. SAME—LIMITATION OF LIABILITY.

A libel to limit liability is not defeated by a recovery by a claimant of less than the stipulated value of the vessel, where his original claim was greater than its value.

4. SAME—PERSONAL INJURY—DAMAGES—CONTRIBUTION—ADMIRALTY RULE 59.

A deck hand on the H. having been injured by the collision without his own fault, *held*, that he had a several claim for his whole damages against the T.; and the T. being responsible, and having a right to indemnity from the H. for one-half what the T. must pay by reason of the common fault of both vessels, *held*, that the usual decree might go against both, without considering the question whether the deck hand, as a fellow laborer, could have maintained a separate suit against the H. or her owners alone.

In Admiralty.

W. C. Peckham, for Briggs.

Owen & Gray, for Day.

E. D. McCarthy, for Cheney.

BROWN, J. The above suits grow out of a collision which took place at about 7:15 p. m. on September 22, 1882, in the Hudson river, a little above Pavonia ferry, near the Jersey shore, between the steam-tug H. W. Hills and the scow or float Mohawk, which was in tow of the steam-tug Titan, and upon her starboard side. The plaintiff in the suit first above named was a deck hand upon the Hills, and was knocked down, stunned, and injured by the collision. He brought suit in the supreme court of this state against the owners and the charterers of the Hills and the owners of the steam-tug Titan, claiming \$20,000 damages. The owners of the Hills thereupon filed their libel in this court, in the suit second above mentioned, to limit their liability under sections 4283 and 4286 of the United States Revised Statutes, at the same time contesting their liability. A stipulation

for the value of the Hills was given in the sum of \$10,000, pursuant to the rule of the supreme court, and a monition was issued, together with an injunction. Briggs thereupon appeared to present his claim and to answer the libel; and the owners of the Titan have also appeared and answered the libel, and filed a stipulation in behalf of the Titan (Adm. Rule 59); so that the whole litigation has, in effect, been transferred into this court.

The H. W. Hills had left Twenty-third street, New York, bound for the Erie dock, Jersey City. She had no incumbrance, and was easily handled. Her course was down the river and somewhat crossing to the westward. She had no lookout except the pilot. The white lights of the Titan and her tow were seen when from a quarter of a mile to half a mile off, on the port bow of the Hills; and, no colored light being seen, it was supposed by the pilot of the Hills that the tug and tow were going down the river. The Hills was then pointing towards the Jersey shore, to the northward of the line of those lights. The tide was ebb, running about three knots, and the Hills was going from 10 to 12 knots in addition. The pilot of the Hills, finding that he was rapidly approaching the tow, ported his wheel in order to go, as he supposed, astern of it; but as the tug and tow were, in fact, going up river, his calculations were thwarted, and he did not perceive his error until too late to remedy it. He therefore kept on under all speed, but did not clear the Mohawk, the port bow of which struck the Hills a severe blow amidships, on her port side, inflicting considerable damage to the boat, and the injury to Briggs for which this suit was brought.

The Titan left pier 19, North river, bound for Hoboken. The Mohawk was on her starboard side, projecting some 20 feet ahead of her, and was heavily loaded with railroad cars. A shed roof, called an umbrella, ran fore and aft along the center of the Mohawk. The ridge or peak of the roof, which ran above the line of the keel, was 13 feet above the deck. The roof sloped on each side about four feet, the eaves being about six inches above the tops of the railroad cars, which were partly beneath them; and the pitch of the roof was about 10 inches. The outside of the float or scow was 16 feet 4 inches beyond the line of the eaves of the roof. The colored lights of the Titan were placed upon the top of her pilot-house, so as to be at that time 17 feet above the water; but they have since been raised to 20 feet. As the Mohawk lay along-side, the green light was eight feet from the outer edge of the float. On the morning after the collision the green light was found upon measurement to be about 13 inches above the top of the cars. As the ridge of the roof, or umbrella, of the Mohawk was some 15 or 16 inches above the top of the cars, the light would therefore be obscured to persons in the range of the umbrella and the light. I cannot entertain any doubt, therefore, that the reason why the pilot of the Hills did not see the green light of the Titan was because it was in fact obscured by the roof of the tow; nor can

I doubt that such an obscuration was a fault on the part of the Titan, and that it contributed to this collision.

The argument of counsel, that the right to tow vessels along-side necessarily involves some obscuration of colored lights, cannot be sustained to the extent here claimed. Rule 5, in connection with rule 3, requires the colored lights to be of such a character as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass; namely, from right ahead to two points aft of abeam. The rule must be construed in reference to its evident and expressed object, to mark the position and course of the vessel carrying it, for the guidance of other vessels. The other lights required to be carried by steam-vessels, when towing other vessels, are in addition to their side lights, and in no way supersede all the requirements in respect to the latter. While such obscuration of colored lights as would be made in the space immediately about the tug by a tow much lower in the water would be wholly immaterial as respects the object of the rule, namely, to give notice to other vessels at a reasonable distance, yet any obscuration that operates at a distance, where other vessels need the notice and the warning that the colored lights are designed to furnish, must be held to be unauthorized and in violation of the rule.

As the Titan, prior to the collision, was headed somewhat towards the New Jersey shore, and as the Mohawk projected also somewhat ahead of the Titan, and the pilot-house of the Hills was lower than that of the Titan, there is no possible doubt that the roof of the Mohawk was between the Hills and the Titan's green light so as to obstruct it. The pilot of the Hills did see the vertical white lights, as well as the single light, which marked the tow, though he did not give them any special attention; and he naturally and properly inferred at first from the absence of the green light that the tow was moving down river, and he had a right to govern himself accordingly; for he had a right to assume that the green light would be visible if the tow was going up river. Much effort was made by counsel to show that the two white vertical lights of the steamer and the white light of the tow were sufficient to indicate whether the tow was going up or down; but the evidence shows that the three lights in such a case would not afford the means of determining this point, unless they were seen against some stationary background, like the shore or some other object; and the position of the Hills and the Titan is not shown to have been such as to afford such background. Had the green light been visible, as it ought to have been, there is no reason to doubt that the pilot of the Hills, who was looking for colored lights, would have seen it, and that the collision would have been avoided; and the Titan must therefore be held in fault.

The Hills had no lookout except the pilot in the pilot-house. There were two deck hands, including the plaintiff Briggs, one of whom should have been assigned to and have performed the duties

of a lookout proper. It is impossible to say that the absence of a lookout at his proper post was in this case immaterial, because there was a space between the umbrella and the top of the cars through which, in some positions, the light might possibly have been seen by a person on deck, and seasonable notice have been thereby conveyed to the pilot of the true course of the tug. But, aside from this, the evidence shows that the Hills was going down and across the river, and crossing the courses of other boats at the high rate of speed of about 13 miles an hour. If this does not in itself constitute imprudent and negligent navigation in the night-time, it does at least require to be combined with it the utmost closeness of watch of other vessels, both by the pilot and by a proper lookout. As I have said, there was no lookout at all; and the weight of evidence shows that, had a careful watch been kept upon the Titan and her tow, even though her green light were obscured, it would have been observed that she was going up river and not down, in time for the Hills to have avoided her. The Hills was unincumbered, and easily and quickly handled. I am satisfied that the Hills could have avoided the Titan at the distance of from 200 to 300 yards; and that between the time when the Hills arrived within that distance of her, and the time when the tug's white lights were first actually seen, there was sufficient opportunity to perceive that the tug was not going down stream, had a proper watch been kept. For this reason I must hold the Hills also in fault.

It is unnecessary to consider the question which has been raised by counsel, whether Briggs, being a deck hand on board the Hills, is precluded from recovering any damages of her, or of her owners, by reason of any fault in her navigation, on the ground that he was a fellow-servant of the pilot in charge. The Titan, being in fault, is answerable for the whole damage caused him, and the liability of the Titan is not a mere joint liability with the Hills, though both are found in fault. The Titan, for its tort, is severally liable for the whole damage. *The Atlas*, 93 U. S. 302; *Chartered Mercantile Bank v. Netherlands, etc.*, 9 Q. B. Div. 118; 10 Q. B. Div. 521, 546. The defense that Briggs was a fellow-laborer with the pilot of the Hills, even if possible to the Hills, would be no defense to the several liability of the Titan. In having to pay Briggs for his injuries, the Titan sustains damages by the collision to that extent, as much as if the injury were to cargo on board the Titan or the Hills, for which she was bound to pay; and as this injury arose from the fault of both vessels, the Hills must answer over for half of what the Titan is obliged to pay; and the Titan, being answerable for the whole damage, has a right to require the Hills to pay one-half of what she will be obliged to pay to Briggs on account of the common fault of both. *The Eleanor*, 17 Blatchf. 88-105; *The Hudson*, 15 FED. REP. 162, 164; *The Canima*, 17 FED. REP. 271, 272; *The C. H. Foster*, 1 FED. REP. 733. There is no evidence of any personal negligence on the

part of Briggs. He was not assigned to duty as lookout, so far as appears; and he was apparently engaged in other duties. It was not his business to leave the duties assigned him and to act as lookout without orders.

A decree for the plaintiff must therefore be entered for \$3,000, the stipulated damages, in the usual form, with costs. The fact that less than the value of the Hills is recovered, does not oust the court of jurisdiction of this proceeding to limit liability. The claim made was much greater than her value; and there may, also, be other claims hereafter presented.

THE LADY BOONE.

(*District Court, E. D. Arkansas. October 4, 1884.*)

MARITIME DEBTS—FIRST ATTACHMENT GIVES NO PREFERENCE.

By the maritime law the creditor first filing a libel and arresting the vessel does not thereby acquire the right to have his debt paid in full to the exclusion of other creditors whose debts are of the same rank and equal merit, and who intervene and prove their debts before or at the time a final decree in the suit first brought is rendered.

In Admiralty.

G. W. Shinn, for libelant.

W. L. Husbands, for intervenors.

CALDWELL, J. On the fourth day of April, 1884, Wishon Brothers filed a libel *in rem* against the steam-boat Lady Boone, for materials and supplies, upon which a warrant of arrest was issued, and the vessel seized by the marshal and the usual monition given. No claimant appeared, and on the day appointed for trial the default of all persons was entered. At the same time, and before any decree was rendered in the cause, Watson and others appeared and filed intervening petitions, claiming liens for materials and supplies. Libelant and the intervening petitioners proved up their claims, and a decree was entered in which the sums due the libelant and the several intervenors were ascertained, and the vessel ordered to be sold and the proceeds paid into the registry for distribution. The proceeds of the sale are not sufficient to pay in full the several sums decreed to the libelant and intervenors. Wishon Brothers move the court to direct the payment of their claim in full out of the proceeds of the sale of the vessel in the registry, to the exclusion of the claims of the intervenors, upon the ground that priority in bringing suit gives them priority of right to payment; that having filed the libel on which the vessel was seized and held until she was sold, they are entitled to be paid in full before anything is paid on the claims of those who subsequently intervened.

The claims of the libelant and of the intervening petitioners are

for materials and supplies furnished on the credit of the vessel, not in her home port, and hold the same rank of privilege, and constitute liens on the vessel by the maritime law. There is some conflict of opinion among the courts as to the proper rule of distribution on the facts of this case. It is undoubtedly true that at law the first lien acquired, either by contract or by operation of law, has precedence. Even equality in judgment liens does not avail against the maxim that the law favors the diligent creditor; and when several judgments are rendered at the same time which are equal liens on the judgment debtor's property, the judgment creditor who first takes the property in execution acquires the right to appropriate it to the satisfaction of his judgment, to the exclusion of other judgment creditors. *Freem. Judgm.* § 374; *Freem. Ex'ns*, § 203. But neither the legal maxim that the law favors the diligent, nor the equity maxim that equality is equity, furnishes the rule by which courts of admiralty determine the priorities of creditors. The maritime law proceeds on principles of its own to determine the precedence of creditors. By that law all creditors do not hold the same rank of privilege. Generally, seaman's wages hold the first rank, a bottomry bond next, and the claims of material-men next. Claims in each rank are paid in full in the order of the rank to which they belong, to the exclusion of those of a lower rank; and if the fund applicable to the payment of claims in any rank is insufficient to pay all the claims in that rank, they will be paid *pro rata*. The last bottomry bond has preference over all former ones, and sometimes the oldest claim for materials and supplies is postponed for that of a later date. But in the case at bar the materials and supplies were furnished by the several claimants about the same time, and there is no ground for giving one a preference over the other, unless the libellant acquired a preference by commencing suit first.

The great weight of authority supports the view that when the proceeds of a vessel are not sufficient to pay all the debts of a given rank, the creditor first filing a libel and arresting the vessel does not thereby acquire the right to have his debt paid in full, to the exclusion of other creditors, whose debts are of the same rank and equal merit, and who intervene and prove their debts before or at the time a final decree in the suit first brought is rendered.

In 2 *Pars. Shipp. & Adm.* it is said: "If the different demands are of the same nature, priority in beginning the suit will not give priority in payment if the other demands are brought to the attention of the court before a decree in the first suit brought is rendered." The rule that a creditor who institutes the first suit does not thereby acquire priority of right to payment over other creditors of the same class who have been guilty of no laches, is supported by the following cases: *The Paragon*, 1 Ware, 330; *The America*, 16 Law Rep. 264; *The Fanny*, 2 Low. 508; *The E. A. Barnard*, 2 FED. REP. 712; *The City of Tawas*, 3 FED. REP. 170; *The J. W. Tucker*, 20 FED.

REP. 129; *The Superior*, 1 Newb. Adm. 186. And to the same general effect: *The Æolian*, 1 Bond, 267, 270; *The Fort Wayne*, Id. 476, 490; *The Kate Hinchman*, 6 Biss. 367; *The Phebe*, 1 Ware, 360.

In support of his motion the libellant relies on Ben. Adm. (2d. Ed.) § 560, where it is said: "In claims of the same rank, the one first commencing his proceedings is preferred in the distribution. The party first seizing holds the property against all other claims of no higher character." And we are referred to *The Globe*, 2 Blatchf. 427, note; *The Adele*, 1 Ben. 309; *Woodworth v. Ins. Co.* 5 Wall. 87. The last case cited stands on grounds of its own, and has no application to the case at bar.

By the maritime law the creditors of the same rank have an equal lien or privilege on the vessel. An eager and grasping creditor ought not to have it in his power to destroy this equality of privilege, and obtain a preference, by the mere act of instituting the first suit to enforce the lien. Such a rule would be unjust to the other creditors, prejudicial to the owners of vessels, and injurious to the interests of commerce. It would tend to hasten and foster litigation, and would introduce into the maritime law that unseemly struggle between creditors themselves produced by the rule of law which gives the preference to the creditor first attaching. We know the rule at law giving the preference to the first attachment, in its practical operation, is often oppressive on debtors and unjust to creditors. For these reasons it has been abolished in a good many states, and the first attachment made to perform the office, in some measure, of a proceeding in insolvency or bankruptcy, for the equal benefit of all the creditors proving their debts within a limited time.

The tendency of legislation and the courts is towards the adoption of rules to prevent preferences. But the injurious consequences of rewarding the most exacting creditor with a preference would, for obvious reasons, be much greater in admiralty than they are at law.

Let an order be entered directing a *pro rata* distribution of the fund.

GRAND TRUNK RY. CO. OF CANADA v. GRIFFIN and others.

(Circuit Court, D. Maine. August 4, 1884.)

TOWAGE—PASSAGE THROUGH DRAW IN BRIDGE—NEGLIGENCE OF DRAW-TENDER—NEGLIGENCE OF TUG—STRANDING OF VESSEL—DIVISION OF DAMAGES.

The schooner C., while being towed by the steam-tug M., was passing with a flood-tide from east to west, and with the wind blowing hard from the north, through a draw in a railway bridge, and the draw not being wide enough for both to pass at once, the tug fell behind. The draw-tender, acting in accordance with the custom of himself and his predecessors for many years, assisted in making fast the lines, and in casting them off, so as to speed the passage of the schooner, and his negligence in casting off one of such lines put the schooner

adrift, so as to be impelled by the wind and tide towards the *southern* shore. After she had drifted once or twice her length, the tug, following her as quickly as possible, overtook her, and made fast to her port side, prevented her from grounding on the *southern* shore, swung her head around into the channel, which was quite broad, and pushed her against the wind across the channel towards the *northern* shore, but, by negligence and mismanagement, pushed her too far in that direction, so that she stranded on *that* shore, at a distance of at least 800 feet from the place where she was cast adrift, or from the place where the tug was made fast to her again. *Held*, that the whole damage caused by such stranding must be borne by the tug.

In Admiralty.

A. A. Strout, for appellant.

B. T. Thompson, for appellees.

GRAY, Justice. This case, though involving but a small amount, presents interesting questions of law.

The owners of the steam-tug Magnet filed a libel *in personam* against the Grand Trunk Railway Company of Canada, to recover damages sustained by the schooner Cumberland while being towed by the steam-tug. The libel alleged that in the afternoon of December 2, 1882, while the schooner and tug were passing with a flood-tide from east to west through a draw in the railway company's bridge across Back Bay, a part of Portland harbor, and the wind blowing hard from the north, the draw-tender negligently cast off one of the lines by which the schooner was attached to the railway company's pier by the side of the draw, so that she became unmanageable and began to drift towards the south shore, and the tug followed and made fast to her, and towed her back into the channel, and the schooner grounded on the north shore of the channel, and was thereby injured, and the accident was caused wholly by the negligence of the defendant's servant in casting off the line, and thus making the schooner unmanageable. The answer denied that it was any part of the duty of the railway company or its servants to receive and make fast, or to loose and cast off, the lines of vessels passing through the draw; and alleged that the schooner was stranded by the fault and negligence of those in charge of the tug, and not by any negligence on the part of the railway company. The district court decided that the stranding of the schooner was occasioned by the fault of those in charge of the tug, as well as by the fault of the servant of the railway company in charge of the draw; ordered the damages caused by the stranding to be divided between the two parties; and decreed in favor of the libelants for \$154.44, being a moiety of those damages, and for costs. From that decree the railway company has appealed to this court. The libelants have taken no appeal.

The evidence clearly establishes the following facts: The pier of the railroad company extended from the railroad bridge 153 feet eastward, and 163 feet westward, and was not accessible by land, except by that bridge. The schooner was 129 feet long, and the tug about 65 feet long. The tug fell behind in passing through the draw, which

was not wide enough for both at once. The tide was on the flood, near high water, and favored the passage through the draw. The draw-tender, acting in accordance with the custom of himself and his predecessors for many years, assisted in making fast the lines, and in casting them off, so as to speed the passage of the schooner. His negligence in casting off one of the lines was the cause, and the only cause, which set the schooner adrift, so as to be impelled by the wind and tide towards the southern shore. After she had drifted once or twice her length, the tug, following her as quickly as possible, overtook her, and made fast to her port side, prevented her from grounding on the southern shore, swung her head round into the channel, which was quite broad, and pushed her against the wind across the channel towards the northern shore, but by negligence and mismanagement pushed her too far in that direction, so that she stranded on that shore, and was injured. The distance of the place of stranding, in the most direct line, either from the place where she was cast adrift, or from the place where the tug was made fast to her again, was nearly 800 feet, or more than six times the length of the schooner.

Considering the nature of the draw-tender's office, the position of the pier, the want of any other person posted thereon to assist the passage of vessels through the draw, the importance to the passage of trains of having the draw closed as promptly as possible, the delay and embarrassment which would necessarily result if the whole duty of attaching and casting off lines were left to those in charge of vessels, and the previous custom of the tender of this draw to take part in that duty, there can be no doubt that his negligence in this particular was the negligence of his master, the railroad corporation, for the consequences of which the corporation was responsible.

But the question remains whether the stranding of the schooner was a consequence of that negligence. No decision directly in point has been cited at the bar; but some aid may be derived from the rules established in analogous cases.

In admiralty, when an injury is caused by the fault of both parties, both are jointly and equally responsible, and each must bear the burden of half the damages. Thus, in the familiar case of a collision between two vessels, caused by the fault of both, the entire damage is divided equally between the two; if only one suffers damage, her owners recover half the damage against the other vessel; if both suffer damage, half the difference between their respective losses is awarded in favor of the one that suffers the most. *The Catharine*, 17 How. 170; *The North Star*, 106 U. S. 17; [S. C. 1 Sup. Ct. Rep. 41;] *Hay v. Le Neve*, 2 Shaw, App. Cas. 395; *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* 7 App. Cas. 795. So, if a vessel, negligently managed, strikes against a pier unlawfully erected in navigable water, her owners may recover half the damage by libel *in personam* against the owner of the pier. *Atlee v. Packet Co.* 21 Wall. 389.

When a collision between two vessels is caused by the fault of the one only, she is liable for the immediate damage to the other vessel, and also for damages resulting from reasonable and proper efforts of her master and crew to save her from the condition in which she has been left by the act of the wrong-doer, as well as for any other consequential damages fairly attributable to that act. But if it is proved that a subsequent stranding of the injured vessel was caused by the negligence of those in charge of her, when they could by the use of ordinary nautical skill have avoided it, the vessel originally in fault is responsible for the immediate effect of the collision only, and for no part of the damages by the stranding. *The Narragansett*, 1 Blatchf. 211; *The Baltimore*, 8 Wall. 377; *The Countess of Durham*, 9 Monthly Law Mag. (Notes of Cases,) 279; *The Pensher*, Swab. 211; *The Linda*, Id. 306; *The Flying Fish*, Brown. & L. 436; S. C. 3 Moore, P. C. (N. S.) 77.

Within the rules thus established, if in the case at bar the schooner had, by the negligence of the railroad company's servant at the draw, been dashed against the pier or the bridge, and been thereby damaged, and had afterwards been stranded by the negligence of those in charge of her, the railroad company would have been responsible for the immediate damages of the collision, but for no part of the additional damages of the stranding.

The only difference in principle between the case supposed and this case is that here no damage was done at the draw, and the whole damage was caused by the stranding. The only negligence on the part of the defendant was at the draw, setting the schooner adrift towards the southern shore. It was the negligence of the master of the tug alone, after the tug had been made fast again to the schooner, had turned her away from the southern shore, and had brought her into the channel, that caused her to run aground on the northern shore.

With great reluctance to overrule the district judge upon such a question, I am therefore constrained to hold that the stranding was caused exclusively by the fault on the part of the libelants, and to order the decree below to be reversed and the libel dismissed.

PERRY and others v. CORBY and another.¹*(Circuit Court, E. D. Missouri. October 1, 1884.)*

GENERAL ASSIGNMENT BY INSOLVENT DEBTOR—REV. ST. MISSOURI, § 354, CONSTRUED.

A conveyance which is not in terms a voluntary assignment for the benefit of creditors, but is in fact a conveyance of the entire property of an insolvent debtor to one creditor, is, whatever its form may be, within the purview of section 354 of the Revised Statutes of Missouri, and will inure to the benefit of all creditors.

In Equity. Motion to set aside order overruling demurrer to bill. For a statement of facts, and the opinion upon the demurrer, see 21 FED. REP. 15.

Mills & Flitcraft, for complainants.

John D. Johnson and Smith P. Galt, for defendants.

BREWER, J., (*orally*.) In the case of Perry against Corby, in which the demurrer to the bill was overruled by me, after argument last spring, a motion was made to set aside that order, and the question involved was heard before the entire bench. That question is whether a conveyance which is not in terms and according to the old technical definition a "voluntary assignment for the benefit of creditors," and yet which is in fact a conveyance of the entire property of the insolvent to one creditor, is within the purview of that statute of Missouri which provides that every voluntary assignment for the benefit of creditors shall inure to the benefit of all creditors. My own views were expressed in the opinion that I filed; and yet in the decision I followed the ruling which had been laid down by my predecessor in office. The case was argued before Mr. Justice MILLER and the entire bench, and I am authorized by Mr. Justice MILLER to say that he agrees with Judge McCrary, and holds that such a transfer, although there is technically no assignee, so long as it is made of the entire property of the insolvent, and is not a mere giving of security by way of mortgage, contemplating payment by the mortgagor in the future, and the retention of possession by him, comes within the scope of the statute, and is to be treated as an assignment, and inures to the benefit of all the creditors.

As to the other questions, he agrees with the views I expressed. Therefore the motion to set aside the order overruling the demurrer will be denied.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

LAFAYETTE Co. and others v. NEELY and others.

(Circuit Court, W. D. Tennessee. October 6, 1884.)

1. EQUITY PRACTICE—CORPORATIONS—NINETY-FOURTH EQUITY RULE—TENNESSEE CODE, §§ 1492-1497.

Where a Tennessee corporation has been dissolved by a foreclosure sale of its franchises, but its existence is continued by statutory provision for a term of five years, during which suit may be brought in its name to wind up its affairs, a bill by stockholders is well filed under the ninety-fourth equity rule, if it appear that the suit is not a collusive one, and that the plaintiffs have applied to such of the late directors as they can reach to bring the suit, and they have refused.

2. SAME SUBJECT—STATUTORY RECEIVER UNDER TENNESSEE ACT, 1852, c. 151—TENNESSEE CODE, § 1101.

But where the corporation was a railroad company, indebted to the state for aid under the internal improvement acts of 1852, and was, at the time of the dissolution, in the hands of a receiver appointed by the governor, the receiver was, under those acts, by operation of law, the manager of the company, and the proper person to bring suits in the name of the dissolved corporation, as required by the Tennessee Code; and if the suit be against the receiver himself to call him to account, the ninety-fourth equity rule would not apply, as it would be unreasonable to ask him to sue himself. The stockholders, therefore, may proceed in their individual right without compliance with the ninety-fourth rule in that respect.

3. EQUITY—TRUSTS—RIGHT OF BENEFICIARY TO AN ACCOUNT—ACCOUNTING WITH EXECUTIVE DEPARTMENT.

It is quite a matter of course that a trustee shall, in a court of equity, pass his accounts whenever demanded by the beneficiary; and he cannot escape an account by showing that the judgment creditors of the beneficiary will absorb the fund, or that he is a statutory receiver, authorized to report to the governor of the state, to whom he has made a satisfactory report. An act of the legislature conferring exclusive power over such account on the executive department would probably be unconstitutional.

4. SAME SUBJECT—UNSATISFACTORY ACCOUNT.

But where it appears that the beneficiary has not been injured by the too general statement of the account, and a failure to file vouchers in the executive department, and there is no showing of false or fraudulent conduct, a court of equity will not, for the mere satisfaction of the plaintiff, require the receiver to account more in detail, and file his vouchers, when the plaintiffs have been foreclosed of their interest in the fund by a mortgage sale.

5. EQUITY PLEADINGS—GENERAL ACCUSATION OF FRAUD.

Mere epithetic accusations of fraud will not suffice in equity pleading, but the facts must be stated which show the conduct complained of to be fraudulent.

6. MORTGAGOR AND MORTGAGEE—ACCOUNT FOR RENTS AND PROFITS—FORECLOSURE SALE—RIGHT OF PURCHASER—SENIOR AND JUNIOR MORTGAGES.

Where a prior mortgagee is in possession, and pending his possession there is a foreclosure sale under a subsequent mortgage, a person buying the property subject to the prior lien, in the absence of any agreement or other circumstance fixing the amount of the incumbrance, is entitled to an account with the senior mortgagor to ascertain the amount due to him at the time of the sale from the mortgagee, and his bid, presumably, included only the amount found due on that accounting.

7. SAME SUBJECT—CREDITS ALLOWED—PERMANENT IMPROVEMENTS.

On such accounting the senior mortgagee will be allowed credits for all permanent improvements and necessary expenditures during his possession, and all incumbrances paid before the sale.

8. SAME SUBJECT—RAILROADS—TENNESSEE INTERNAL IMPROVEMENT ACTS OF 1852—TENNESSEE CODE, § 1101—STATE RECEIVER.

This principle applies to a receiver in possession of a railroad under the Tennessee internal improvement acts of 1852, (Code, § 1101,) during whose

possession the road is sold at the suit of its own mortgage bondholders, and the equity of the purchasers to the accumulated earnings in his hands is paramount to that of the stockholders and creditors, and the bill of the latter for an account will be dismissed.

9. SAME SUBJECT—TENNESSEE RAILROAD LIQUIDATION ACT OF 1869, c. 38.

This principle of the general law of the relation of the parties is strengthened by the liquidation act of 1869, c. 38, under which the purchasers, by consent of plaintiffs, liquidated the company's debt to the state on the express condition that the purchasers should be substituted to the lien of the state upon the earnings in the receiver's hands. The plaintiffs cannot now repudiate that agreement by diverting the fund to the payment of other debts, or by distribution of it among the stockholders.

In Equity.

Harry M. Hill and Humes & Poston, for plaintiffs.

E. C. Walthall, Wright & Folkes, and *James Fentress*, for defendants.

HAMMOND, J. The objection that this bill does not show conformity to the ninety-fourth equity rule cannot, I think, be maintained. The bill was filed April 1, 1882, and if we date the alleged dissolution of the corporation at the time of the foreclosure sale on August 27, 1877, which is the very earliest date at which it can be said to have been dissolved, the suit was commenced within the five years allowed by our statutes for a dissolved corporation to bring suits in its corporate name, notwithstanding the dissolution. Tenn. Code, 1492-1497; *Rogersville & Jefferson R. R. v. Kyle*, 9 Lea, 691; *Kelley v. Mississippi Cent. R. Co.* 2 Flippin, 581; S. C. 10 Cent. Law J. 286; S. C. 1 FED. REP. 564. But if a later date be fixed, such as the confirmation of the sale or the final decree in the foreclosure suit, which would bring the date of the suit beyond the five years of the statute, it is clear the ninety-fourth equity rule does not apply, if it be conceded that it applies during the five years to a dissolved corporation with continuing power to sue under the peculiar features of the above-cited Tennessee statutes, as to which I express no opinion. The rule does not, in terms, include a dissolved corporation, (Jones, Rules, 151,) and it seems settled that the dissolution of a corporation, and its inability to proceed by suit, does not deprive the shareholders of a remedy in their own name in a court of equity. *Rogersville, etc., R. R. v. Kyle*, *supra*, at p. 698; *Shields v. Ohio*, 95 U. S. 319, 324; *Bacon v. Robertson*, 18 How. 480; *Lum v. Robertson*, 6 Wall. 277. Of course, when the functions of the directors, managers, and shareholders have closed by dissolution, they no longer occupy that relation, and it is in their own right as individuals that the shareholders must seek redress. It cannot be, therefore, that in such a case the ninety-fourth rule was intended to operate. *Greenwood v. Freight Co.* 105 U. S. 13, 16. Conceding, however, that the rule extends to a Tennessee corporation during the five years of posthumous existence granted to it by the state statutes, the amendment shows that the plaintiffs have done everything that they could reasonably be required to do, under the existing circumstances, to comply with the rule. Affidavit is made that

plaintiffs were shareholders at the time of the transaction, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which otherwise it would have no cognizance, which manifestly, without the affidavit, it is not; and, after all, this is the main requirement of the rule, if not its chief object, and the only one in the power of the court to accomplish by a rule of practice; for, it cannot be assumed that the court intended to or could, under a power to prescribe rules of practice, impose limitations on the jurisdiction on the federal courts not imposed by any act of congress. The rule should not, at least, be so construed until the supreme court itself has affirmed the power to do this. The cases upon which the rule is predicated explain its meaning, and they do not require impossibilities on the part of a shareholder. In the leading case of *Hawes v. Oakland*, 104 U. S. 450, 461, where the required efforts to secure corporate action are described, it is said that the plaintiff may "show a case, if this be not done, where it could not be done, or it was not reasonable to require it;" and the "total destruction of the corporate existence and the annihilation of all corporate powers" constitute an acknowledged exception to the rule. *Greenwood v. Freight Co.*, *supra*. See, also, *Detroit v. Dean*, 106 U. S. 537; S. C. 1 Sup. Ct. Rep. 560; *Hayden v. Manning*, *Id.* 586; S. C. 1 Sup. Ct. Rep. 617; and *Dimpfel v. Ohio & M. Ry. Co.* 110 U. S. 209, S. C. 3 Sup. Ct. Rep. 573, for a further elucidation of the principles upon which the rule is founded.

Now, by the Tennessee Code, "the managers of the business of such corporation at the time of its dissolution, by whatever name known, are the trustees of the stockholders and creditors," authorized by these statutes to settle its affairs and "sue for and recover the debts and property of such dissolved corporation in its corporate name." Tenn. Code, §§ 1494, 1495.

The principal defendant, Neely, was himself, at the time of the dissolution of this corporation, the statutory receiver appointed by the governor under the act of February 11, 1852, c. 151, § 5, p. 207, (Code, § 1101,) "to take possession and control of said railroad and all the assets thereof, and manage the same, etc., and to continue in possession of said road, fixtures, and equipments, and run the same, and manage the entire road" until the debt to the state was paid. *State v. E. & K. R. R.* 6 Lea, 353, 355; *Erwin v. Davenport*, 9 Heisk. 44. If this was not the "annihilation of all corporate powers," it certainly did, in fact, as appears by this bill, paralyze those corporate powers; for the road was surrendered by him to the purchasers under the foreclosure sale, he accounted only to the governor or these purchasers, and the directors or stockholders have not since attempted any corporate action or kept up any corporate organization. Either Neely was himself the person to whom, under this rule and these state statutes, application should have been made to bring this suit in the corporate name,—which were a vain thing to

do, and it is unreasonable to ask it,—or no such application could, under the terms of the statute, be made at all. The directors and stockholders were, by the statutes, superseded or deprived of their power, and under the law it has never been restored to them. *Erwin v. Davenport, supra*. Furthermore, the amended bill alleges that the plaintiffs have applied to such of the directors as they could find to take corporate action in this matter; but that they are scattered throughout the country, and have apparently abandoned all their functions and refused to act. Having made all stockholders who choose to come in parties, it would seem, under the circumstances, unreasonable to require that corporate action should be sought through application to them. The bill does not with sufficient precision name the directors to whom application was made, nor show in detail the efforts to comply with the rule in that regard, as it should have done; but, under the facts disclosed, I am of opinion that the plaintiffs have done the best they could, and for the reasons stated overrule that ground of demurrer.

The plaintiffs insist that at all events the corporation was, and now they are, entitled to an account against their trustee, this statutory receiver of their property. Certainly I have been unable to find any case where the trustee can refuse to account because the beneficiary would get nothing if an account were had, by reason of his inability to respond, which is not set up here, however, or any other reason, such as that there are judgments against the beneficiary which would absorb the products of the account, as has been stated is the case here, inasmuch as there is an immense amount of the mortgage debt unpaid, for which there is a judgment of this court still unsatisfied. The valueless character of such litigation is set out in *Bayliss v. Lafayette, etc., Ry.* 8 Biss. 193, but evidently the court hesitated to dismiss the application, and was content to advise the parties that if the litigation should be fruitless, there was no practical value in it. I cannot assent to the doctrine that a trustee may thus escape an account, any more than that a court should refuse a judgment because it appeared that the execution would be returned *nulla bona*. An account against a trustee is almost always a matter of course. *Pulliam v. Pulliam*, 10 FED. REP. 23, 26. It will, however, only be granted at the suit of one having a right to the fund of which an account is asked. Neither can the fact that the defendant accounted with the governor, and received his commendation for the faithful discharge of a trust, assuming that we take judicial notice of the executive action in this regard, avail him as a defense. The act of 1852, under which he held his trust, does not make the executive department the exclusive arbiter of this trust, nor authorize it to acquit the trustee of all liability by approving his accounts. There seems to be no intention to deprive the courts of their powers in such matters, and the remedy on the bond of the receiver can only be concurrent with that of compelling a settlement through the medium of

a court of equity. If the act undertook to invest the executive department with exclusive power over the accounts of this receiver, it is, on well-settled principles, probable that the courts would pronounce it unconstitutional. *Jones v. Perry*, 10 Yerg. 59; *Cooley*, Const. Lim. 87-114, 392.

Other objections to the bill have been taken by the demurrer and in argument, which, for the present, at least, we will pass, and come to the substantial controversy between these parties upon this demurrer; and that is, the contention that the facts disclosed by the bill show that the plaintiffs have really no interest in the funds for which they allege the defendants are liable. Why take this account, say the defendants, when it appears that, as between the plaintiffs and the foreclosure purchasers, the funds in the hands of the receiver were the property of those purchasers? They insist that it is not pretended that he withholds them, or has appropriated them to his own use, but only that he has improperly turned them over to those purchasers, and that, even if he still retains them, they do not belong to the plaintiffs. If this be so, undoubtedly this bill should be dismissed. But there is some difficulty in determining it upon demurrer, by reason of the somewhat meager and indefinite statements of the bill as to the precise facts of the case, though both parties seem desirous of having the question determined, and have endeavored, by amendment, to make the bill more definite.

Generally, the facts are that this railroad having been constructed under the internal improvement laws of Tennessee, more particularly considered in the case of *Stevens v. L. & N. R. R.* 3 FED. REP. 673; *State v. E. & K. R. R.* 6 Lea, *supra*, and *Rogersville & J. R. R. v. Kyle*, 9 Lea, *supra*, the state held a statutory lien for the aid extended to it, paramount to all other liens whatever. Being in default for the interest and sinking fund due, under those laws, upon the state bonds it had received, the defendant Neely was, by the governor, appointed receiver to take charge of the road, and discharge the duties required by those acts of the legislature. While he was so in control of the road, it was sold by a decree of this court, under a foreclosure suit, to satisfy a very large mortgage debt, subordinate to the lien of the state for its debt. By the statutes and the decree, this sale was *cum onere*, and the purchasers took the title subject to the debt due the state. The purchasers organized a corporation, which, under authority of law, by subsequent consolidation and changes of name, became the present Illinois Central Railroad Company, a defendant to this bill. These purchasers liquidated the debt due the state by paying it off, principal and interest; how, does not precisely appear by the bill, except that it was done by buying the bonds of the state secured by its lien, which were paid in and canceled, the bonds being purchased at a heavy discount. But it is seemingly agreed in argument that they did this by taking advantage of the act of February 25, 1869, c. 38, p. 50, which permitted any railroad company to pay the

principal of the debt for which it was liable to the state, in any bonds of the state, for an equal amount, and authorized it to issue its own bonds to raise the money, which were to be secured by substituting these new bonds to the lien of the state in all respects. Also, any other person or corporation, with the consent of the railroad company itself, was authorized to pay the debt, issue its substituted bonds, and likewise be subrogated to the lien of the state. At the time of this liquidation of the debt due the state, it appears by the bill, as amended, that Neely was still in possession as receiver, and did not surrender the road to the purchasers until, in addition to the principal debt, they had paid to the state the sum of \$94,234, past-due interest, accrued and not paid by him as receiver. This payment, and the \$1,119,000 of principal due, constituted the sum paid by the purchasers to the state, and thereupon the receiver surrendered the road and all the assets and property in his hands to the purchasers. These figures may not be exactly accurate, but they serve to indicate the facts involved in the controversy. They are taken from the statements of the amended bill, which also refers to the answer of Neely accompanying his demurrer, and adopts certain paragraphs thereof, from which it will probably appear that, after deducting certain taxes paid, the correct amount of accrued interest paid by the purchasers was \$85,811.27. It does not appear what, if anything, was due on account of the sinking fund. Neely made his report to the comptroller stating the amount of his receipts and disbursements; but complaint is made by the bill that he does not go sufficiently into detail, and that he files no vouchers with his report. This report is exhibited with the bill, which avers that Neely had on hand, as shown by the report, about \$25,000 cash, and iron rails of about the value of \$36,000, which he turned over to the purchasers. It further alleges that, well knowing that the company was insolvent, and that very soon the road would be sold, Neely used the funds in his hands very largely for making "permanent improvements not necessary for the operation of the road, and not coming within the designation of necessary repairs,—among other things, substituting steel for iron rails,—and that, knowing they could not be used, he invested in rails which were not placed on the track, but wrongfully turned over to the purchasers." In other words, the bill charges generally that Neely collusively improved the road out of the earnings for the benefit of anticipated purchasers, and seeks to hold him liable for these unnecessary improvements. The report itself, exhibited with the bill, shows that Neely, during the 20 months he held the road, received of its earnings \$802,241.52, and paid out in "operating expenses" \$570,303.18, and in "extraordinary expenses," \$66,663.03, and to the state on account of interest due, \$110,000. This left in his hands, after adding the value of fuel and supplies, on hand to the amount of \$49,801.28, a sum aggregating \$105,075.77. Against this he states that there was due from him on his pay-rolls the sum

of \$32,409.35, for balances on supply bills, \$34,887.59, and for balances due "on new rails purchased and being delivered," \$34,000, leaving "an apparent net profit" of \$3,778.83, which, he says, would be overbalanced by claims set up for damages for killing stock, etc. He further states in his report that the road having been sold, and the purchasers having satisfactorily liquidated the debt due the state, he transferred the property to them on November 28, 1877, "together with all assets in my hands, they assuming all my indebtedness as ascertained and adjusted, which they are paying promptly." He further explains that when he got the road in March, 1876, it was in a very dilapidated condition, and that, in order to make it earn the money due the state, he found it necessary to make "permanent improvements," and that he had put it in "first-class condition."

It is not averred in the bill (except in a general charge "that he has received and has never accounted for many thousands of dollars of said funds") that Neely received more or expended less than he reports to have done, and it is frankly conceded in argument that he is not accused of falsely stating this account. But it is insisted that he should have accounted, and should now be required to account more in detail and to file his vouchers. Manifestly, in equity pleadings, general accusations of fraud and collusion are ineffective. 1 Daniell, Ch. Pr. (5th Ed.) 324, and notes; *Riley v. Lyons*, 11 Heisk. 251; *Whitthorne v. St. Louis M. I. Co.* 3 Tenn. Ch. 147. The pleader should state the facts, and not formulate mere epithetic "charges." And it has been recently decided that the same rule applies at law. *Hazard v. Griswold*, 21 FED. REP. 178. If the facts are not to be ascertained by diligence, because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity for discovery, where that is wanted; but a court cannot sustain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrong-doing appears, without much necessity for characterizing it as such. *Shepherd v. Shepherd*, 12 Heisk. 276.

This report evidently is subject to the complaint that it does not state the accounts properly supported by vouchers; and, other questions aside, it would not satisfy a court of equity; but it was not intended as an accounting in the strict sense, but only as a report of the receiver to the accounting officer, who should unquestionably, if he did his duty as such, have more thoroughly inspected and audited these transactions of an agent of the state in which others than the state had an interest; and the complaints of the bill against the executive officers, if true, are well founded, and show neglect of the plaintiffs' rights in the premises. And here I have hesitated whether or not a court of equity should not, for the mere satisfaction of complainants, require this receiver to pass his accounts in such a way that

they could see in detail what he had done while in charge of their property. But a court of equity must be able to see that there has been such a failure of the trustee in his duty to keep and exhibit his accounts that the plaintiffs have been injured, and there is no such showing by this bill. *Non constat* that Neely did not keep accurate and detailed accounts of his doings, which are open to the inspection of plaintiffs upon their demand, nor that they could not from this source obtain all the information they need to determine whether he has falsely stated them. And when in argument it is conceded that plaintiffs have no information that he has falsely stated them, it would seem unnecessary to take an account merely to satisfy them that the statements in this report were true.

We come, then, to the consideration of the questions growing out of the above-stated facts, which involve the substantial merits of this controversy. For the plaintiffs it is contended with earnestness and force that, inasmuch as the mortgage for the bonded debt of the company which was foreclosed did not include the earnings of the road, those accumulated in Neely's hands did not pass to the mortgagee or the purchaser, and when the sale took place, subject to a prior lien, the purchaser so regulated his bid as to obtain the property at a price which would enable him to discharge the prior lien and give that sum for it. In other words, that in buying the property subject to the prior lien these purchasers assumed that debt, expected to pay it, and put their price accordingly, and now have no equity to demand that, as between them, the other property of the mortgagor shall be applied to ease their burden by paying the debt which they are equitably bound to pay out of their own means. For this principle the main case relied on is that of *Pickett v. Merchants' Bank*, 32 Ark. 346, which, so far as relates to this question, was a suit by the mortgagor against the mortgagee to overhaul a bank account for usury. There had been a sale of the mortgage property, and it had been purchased by the mortgagee under an agreement between the parties as to the application of the proceeds of sale to certain prior incumbrances and then to the mortgagee's own debt. But there was an incumbrance for delinquent and unpaid taxes, paid by the mortgagee after the sale, which had not been included in the agreement, and when the mortgagee was about to enforce his lien upon other lands for the balance due, the controversy arose as to the true amount of that balance. It was held that the mortgagee had purchased *cum onere*, and was not entitled to a credit for the taxes paid. "When the warehouse property was sold," says the court, "it was incumbered with unpaid taxes, and, as we presume, was purchased for less on that account." Other authorities are cited for this position, but it is not necessary to cite them here, as the court, for the purposes of this decision, fully concedes the force of the position.

On the other hand, it is insisted that when a junior mortgagee purchases under a foreclosure sale the mortgagor's equity of redemp-

tion, he is entitled, as against a senior mortgagee in possession, to the same account of rents and profits that the mortgagor could have had. This seems, also, to be well settled by authority. There is sometimes much difficulty in the application of the rule, because the peculiar facts of the case leave it uncertain where the rents and profits of mortgaged premises belong, notwithstanding the possession of the mortgagee; and sometimes, by the agreement of the parties, or other like intervening circumstances, the rule which ordinarily obtains is displaced. Indeed, the local law of the state often interferes to regulate the incidents of the mortgage, and affects this as well as other rules governing the relation of mortgagor and mortgagee. Mr. Pomeroy has very ably shown how the law of mortgages has been thus changed in many of its incidents by local law. Pom. Eq. §§ 73, 74, 162, 163, 1179-1191. Making allowances, however, for such deviations, the rule contended for by the defendants is well established. *Harrison v. Wyse*, 24 Conn. 1; *Kellogg v. Rockwell*, 19 Conn. 446; *Childs v. Childs*, 10 Ohio St. 339; 2 Jones, Mortg. 1070-1085. I do not find any Tennessee case in which the point has been considered, but generally in this state the ordinary law governing the relation of mortgagor and mortgagee in a court of equity prevails. *Henshaw v. Wells*, 9 Humph. 568; *Vance v. Johnson*, 10 Humph. 214; *Bidwell v. Paul*, 5 Baxt. 693; 1 Meigs, Dig. (2d Ed.) § 527, subsecs. 7, 9, 10; 3 Meigs, Dig. (2d Ed.) §§ 1984, 1987; 1 Pom. Eq. § 163; 3 Pom. Eq. § 1187, p. 158. In an account between the mortgagor and mortgagee, the mortgagee in possession, while accounting for rents, is credited with permanent improvements, necessary expenditures, taxes, insurance, and prior incumbrances paid by him. *Leiper v. Ransom*, 2 Cold. 511, 514; *Bradford v. Cherry*, 1 Cold. 60; *Kellogg v. Rockwell*, *supra*.

But these two propositions of the plaintiffs and defendants, respectively, are not antagonistic to each other. While the purchaser buys the property *cum onere*, unless there is something in the agreement of the parties, as in *Bank of U. S. v. Peter*, 13 Pet. 123, and *Belcher v. Wickersham*, 9 Baxt. 111, or some other attending circumstance to control it, he only agrees to pay what is due to the prior mortgagee on a proper accounting with the mortgagor at the time of his purchase. Presumably, that is the sum he takes into his calculations when he makes his bid, and not a larger sum which may apparently be due; unless, as before stated, the amount is fixed beforehand, in which event that is the sum he must pay at all hazards. Assuming, then, that these purchasers bought the equity of redemption at the foreclosure sale, as we must if it was a foreclosure sale strictly considered, and that our statutory redemption has been by the decree barred, or has lapsed by the long time over the statutory two years allowed for redemption which have passed since the sale in August, 1877, it is the purchasers who are entitled to this account and the proceeds of it, and not the original mortgagor. In the Arkansas case

relied on by the plaintiffs the tax incumbrance had been overlooked by the purchaser, and on the principle that he had bought *cum onere*, he had that incumbrance to pay, as these purchasers did the debt of plaintiffs' company to the state. But surely, in that case, if there had been a dispute about the amount of the taxes due on the warehouse, and it had been made to appear that by payments made by the mortgagor the amount of taxes was only, say, \$1,000, instead of the \$2,473, the difference would have inured to the benefit of the purchaser, and not to the mortgagor, by requiring the purchaser to pay to him the balance of \$1,473. If, indeed, the parties had agreed before the sale that the larger amount of taxes was due, and the bidding had been predicated on that understanding, but subsequently it was found to be less that was paid to the tax collector, the difference would belong to the mortgagor, to be paid to him or credited on the mortgage debt; but this bill has no feature like that, and such a claim could not be set up here.

It is not necessary, if this be a correct view of the equities of the parties, to say more than that the result is that plaintiffs show no such interest in the fund alleged to be due as entitles them to the account they seek, and consequently the demurrer should be sustained, and the bill dismissed for want of equity on the face of it. But, if we look at the equities of the parties in a broader view, the same judgment must be reached. Evidently, after paying out of the funds in his hands the balances due by him for expenditures that will not be disputed, the receiver should have paid the remainder of the fund to the state on its claims for over-due interest and sinking fund. Instead of doing this he used the money to improve plaintiffs' property, and presumably they got the benefit of it in a higher price, and consequent greater reduction of their mortgage debt. How can they complain at this? Again, the receiver having allowed the interest claim of the state to remain unpaid to, at least, \$85,000, and, perhaps, counting the sinking fund, largely more, these purchasers have paid it in order to relieve their property of the lien for it. Now, upon the plainest principles of subrogation, as between the mortgagor and these purchasers and this receiver, whatever be held in cash, or was liable for by improper management, was a fund primarily liable (and known to be such by the purchasers when they made their bid) for payment of the accumulated interest and sinking fund, and they are entitled to have it so applied. The authorities already cited establish this. The mortgagor would be only entitled to the surplus, and it is plain there could be no surplus in this case on the facts already stated.

Now, this fund has been so applied, on an agreement between the state, the purchasers, and the receiver, by his turning over the assets in his hands, and they paying the interest; and it is quite manifest that they have not received more than was due after paying the charges on the fund. That the receiver expended some of the money

in improvements that were permanent, and rails that were delivered but not fully paid for, cannot, as before intimated, be a cause of complaint, if it enhanced the value of the property. But more than this, he was, by the general law and the statutes under which he acted, invested with plenary powers in the matter of managing the road; and, as it appears, this 117 miles was only a link in a great line of transportation, he could not earn sufficient money to pay the interest unless he did improve it; and it is certain that this policy was the best for the state, whose claims, under the statute he was executing, were paramount in importance to any interest of the stockholders. He may have known that the company was hopelessly bankrupt, and that the road must pass into other hands; but the interests of the state were his chief concern, and this consideration should have had no influence with him. He was not bound, as the plaintiffs seem to think, to withhold all expenditures for improvements which would increase his earnings, because it was more desirable to them that he should reserve the money for the other uses of the bankrupt owners. They have received the full benefit of the earnings in their payment of the interest debt to the state, for which they were pledged. They have the benefit of the improvements in the reduction of their mortgage debt, and this is all that, honestly, they can ask. They might have managed differently. They could have used the earnings for the purposes of dividends, allowed the road to run down, and thereby left a larger debt due from an insolvent company, both to the state and their own immediate bondholders. But perhaps it was a fear of this kind of management and its temptations that induced the governor to appoint a receiver; that induced the legislature to make provision for one; and that made a foreclosure desirable. At all events, it does not lie in the mouth of plaintiffs to complain that the receiver did not thus manage in their selfish interest. The interests of the creditors, state and private, demanded, as did the material interests of commerce, which prompted the public aid given these plaintiffs, that the receiver should manage as he did.

Finally, this case has been heretofore considered under the general principles of equity governing the relation of the parties, but it is impossible to read the acts of the legislature already cited, which regulate the rights of these parties, and not feel that these principles are greatly strengthened and enlarged by those acts. By the act of 1869 these purchasers were permitted, with the consent of the company, to liquidate the debt due the state and be substituted to the state's lien. They did liquidate that debt, obtaining presumably the plaintiffs' consent through their corporate representatives; and to allow them now to divert this fund from the payment of the interest due the state, on the theory of this bill, would be to allow them to repudiate that consent and its consequences. This act substituted the purchasers to whatever right the state had to the funds in Neely's hands, and there was not more than enough to pay the state, on the facts of this case.

The state had a lien on the earnings, certainly, and it passed to the purchasers under this act of 1869, and if Neely has anything for which he should account, it belongs to them. Act 1869, c. 38, p. 50. As to the plaintiffs, who are creditors, they can occupy no higher ground than the stockholders in the matter of demanding an account. Indeed, it may be doubtful if judgment creditors are ever entitled to an account against a prior mortgagee in possession. *Worthington v. Wilmot*, 59 Miss. 608. But as to this we need not now inquire, the questions decided being as conclusive against the creditors as the stockholders.

There are other grounds of demurrer, some relating to those plaintiffs who are creditors, but no further notice will be taken of them, since, on the ground above indicated, the demurrer must be sustained, and the bill dismissed at the costs of the plaintiffs.

Decree accordingly.

VOLENTINE v. HURD and others.

(Circuit Court, D. Vermont. October 7, 1884.)

FRAUDULENT CONVEYANCE—MORTGAGE—COMPOSITION WITH CREDITORS—ABSCONDING DEBTOR—FORECLOSURE OF MORTGAGE.

H., being hopelessly insolvent, applied to V., one of his creditors, for a loan of \$15,000, to compromise his debts by payment of 25 cents on the dollar. V. loaned him the money with full knowledge of the facts of the case, and took a mortgage, executed by H. and wife, on his homestead farm (which was all of his property within reach of his creditors) in Vermont, duly recorded it, and thereafter advanced the money, taking no precautions to procure its payment to the creditors. The deed of composition provided that H. might sell or dispose of his property within a certain time in furtherance of a settlement with his creditors. V. and some other creditors signed this deed. H. failed to pay the money as agreed, and fled with it to Canada. V. subsequently filed a bill to foreclose the mortgage, making attaching creditors defendants with H. Held, that as to all the property, except the homestead interest in the land, the mortgage was void as to the creditors; that V. was entitled to foreclose as to the homestead interest only on payment to the attaching creditors who were parties to the deed of composition the 25 cents on the dollar, as agreed, with interest; and that as to the residue of the estate the bill should be dismissed.

In Equity.

Martin & Eddy and *J. K. Batchelder*, for orator.

A. L. Miner, *J. C. Baker*, and *H. A. Harman*, for defendants.

WHEELER, J. This suit is brought to foreclose a mortgage of \$15,000 on the homestead farm of the defendant Reuben T. Hurd, situated in Arlington, Vermont, against his attaching creditors as well as against him. The mortgage was executed on the twenty-first day of July, 1880, at Arlington, in the absence of the orator, and was recorded in the land records of Arlington, as required by the laws of the state, on the ninth day of August following. The consideration was advanced, \$5,000 on the first and \$10,000 on the eighth days of Oc-

tober following, by the orator to a brother of the mortgagor, at Aurora, Illinois, where the orator resides. The mortgagor makes no defense; the creditors defend upon the ground that the mortgage is fraudulent and void as to them.

The mortgagor was, at the time of the execution of the mortgage, hopelessly and desperately insolvent, and this became fully known to the orator when he became informed of the mortgage. The mortgagor started a composition with his creditors, by deed dated July 27, 1880, in which the creditors, signing and sealing, agreed to "accept, receive, and take of and from the said Reuben T. Hurd, his executors and administrators, for each and every dollar of our respective claims and demands against said Reuben T. Hurd, the sum of twenty-five cents, in full satisfaction, payment, and discharge of all and every our debts, claims, and demands; such composition to be paid to us severally and respectively within four months from the date of these presents." And they further therein agreed that he might, "from time to time, and at all times hereafter, within the said term of four months from the date hereof, assign, sell, or dispose of his property, stock, and effects," "for and towards the payment and satisfaction of the composition of the debts, claims, or demands of us and every of us."

There was no provision that all the creditors should sign. The orator was a creditor before the mortgage, and signed and became fully aware of the composition deeds. The defendant the Battenkill National Bank, for a consideration paid, agreed to assign its claim to the brother of the mortgagor for the further consideration of 25 cents on the dollar to be paid, in order that the claim might be brought within the terms of the composition. The defendant Hawley had an attachment on the farm prior to the mortgage, the *ad damnum* in the writ and amount directed by the writ to be attached being \$1,500. For a consideration agreed to be paid, he signed the composition deed, and signed a writing stating that he released and discharged the liens by the attachment, and discontinued the suit as to Hurd, and delivered it to him. The other defendants did not become parties to the composition. The 25 per cent. was not paid to the Battenkill Bank nor to Hawley. The mortgagor gave up carrying through the composition, and with the money received from the orator fled to Canada without paying his creditors any considerable part of it. At the time when the money was advanced by the orator upon this mortgage, it covered all the property within the reach of the mortgagor's creditors at that time, and the orator was fully aware of this fact. That the loan was negotiated by the mortgagor for the purpose of obtaining money to pay the 25 per cent. on the composition, well enough appears, and this purpose was understood by the orator. That the mortgagor intended, when he received the money, to take it beyond the reach of his creditors if the composition failed, also is apparent. There is no evidence that the orator knew of this purpose,

but he was fully aware that placing the money in his hands without safeguard would enable him to avoid his creditors if he would.

The case stands differently as between those who were parties to the composition agreement and those who were not. And as to this the Battenkill Bank was in reality, although not nominally, such a party. It brought itself within the scope and effect of the agreement. It is not considered that it would be necessary that all the creditors should become parties to the composition to make it binding. In *Cobleigh v. Pierce*, 32 Vt. 789, there was an express provision that all should sign to make the agreement valid. In *Chase v. Bailey*, 49 Vt. 71, the provisions were such for dividing the property of the debtor *pro rata* among his creditors that it could not be carried out unless all should sign. Not so here; the agreement of each creditor is several. The consent of more than one creditor might be necessary for a consideration where the contract is simple and a consideration required. But this contract is under seal, which imports a consideration, and would bind Hawley, who sealed it with his seal; and the Battenkill Bank received a consideration for what it entered into, and, besides, the procuring the agreement of the others who did sign, would probably be a sufficient consideration of itself for that undertaking.

The mortgage was fully accomplished within the four months by being made, accepted, and recorded, and the money advanced. The mortgagor had the right to dispose of his property for the payment of the 25 per cent. on the debts at any time within the four months. Any party to the compromise had the full right to purchase the property or take lien upon it during that time for that purpose, but impliedly, by the terms of the agreement, not for any other purpose. Had the mortgagor paid Hawley the 25 per cent. on his claim, and the Battenkill Bank 25 per cent. on its claim, within the four months, they would have had no just ground to complain against the mortgage. If they were defrauded by it at all, it was only as to the 25 per cent. The orator knew that by the effect of the agreement the mortgagor had no right to dispose of his property, by mortgage or otherwise, except "for and towards the payment and satisfaction of the composition." He had no right as to them to loan money on a mortgage to the debtor generally during that time. The property was expressly charged with the trust, as between the parties to the agreement, of paying the 25 per cent. The orator violated the trust when he loaned the money generally on the mortgage without seeing to it that the 25 per cent. was paid. He, at least, took the risk of seeing that the money went for that purpose; and, as it went from him into other channels without the consent of Hawley or the bank, he is responsible, and not entitled to a decree of foreclosure as against them, without providing for the payment of the 25 per cent. of their claims, with interest from November 27, 1880, before which day that amount should have been paid.

By the statutes of Vermont the orator, in a bill to foreclose a mortgage, may join as a defendant any subsequent attaching creditor of the premises sought to be foreclosed. Rev. Laws Vt. § 762. Creditors who did not become parties to the composition, and have attached the premises subsequently to the mortgage, are made defendants under this statute. Their rights are to be determined.

The mortgagor's liabilities were from \$125,000 to \$150,000, and his assets were only about \$50,000. The mortgage was executed at Arlington while the orator was at Aurora, and apparently without his knowledge. The effect of it was to place substantially all of the attachable property of the mortgagor in Vermont under its cover. From the course and proceedings of the mortgagor, the obvious purpose of it was to induce or compel his creditors to accept of the composition, and to provide means for the payment of the percentage if they should accept. When it was brought to the knowledge of the orator, he was, or became, fully aware of its effect. He must have known that its existence on the record would be a great embarrassment and hindrance to creditors. Still he placed it upon the record without then advancing any consideration, and, in the language of 27 Eliz., left it to stand, "colored, nevertheless, by a feigned countenance and show of words and sentences, as though the same were made *bona fide*, for good causes, and upon just and lawful considerations;" or, in the language of the statute of Vermont, justified the same to have been made and executed in good faith, and upon good consideration. Afterwards he advanced the consideration, but not until all prior liens were, as he supposed, removed out of its way, so that when the mortgagor got the money, which became the consideration of the mortgage, he could hold it in defiance of all his creditors, with the mortgaged premises covered by the mortgage and apparently out of their reach.

The purpose for which the orator testifies he understood the consideration was to be used, was to pay the 25 per cent. on the composition. It does not appear how far the composition had proceeded when he made the advance, but it does appear that many creditors never became parties to it, and that those who did were not paid the 25 per cent. to any considerable amount. The latest information which he received, according to his own account, was from the mortgagor, that he was "getting along very well with compromise; there are a few who stand out about the matter, but not large amounts. Hope to get it all fixed soon." If all the creditors became parties to the composition, and received their share under it, none would be defrauded by the mortgage; but if any did not, and the purpose which the orator understood was to be carried out to pay those who did, those who did not would be defrauded. The property would be gone, and they be left without pay, with the mortgagor's property all the while out of the reach for collecting their pay.

In the language of the resolutions of *Twyne's Case*, 3 Coke, 80, "it

would prove injurious to other creditors of the same debtor in depriving them of all means of satisfying themselves by the stated methods of justice." If the composition was carried out, its purposes were laudable; if not, they would be fatal to those not joining in it. The orator did not wait to see whether all would join or not. He had full knowledge of the situation, and made the advances in view of the effect which would follow a failure. He purposely aided in putting all the attachable property of the mortgagor under the cover of the mortgage beyond the reach of the creditors of the mortgagor, if the mortgage should be upheld. Such conveyances as place substantially all of the property of the debtor beyond the reach of creditors have always been held fraudulent and void in Vermont, by whose laws this case is to be governed. *Edgell v. Lowell*, 4 Vt. 405; *Root v. Reynolds*, 32 Vt. 139; *Church v. Chapin*, 35 Vt. 223; *Prout v. Vaughn*, 52 Vt. 451. This mortgage cannot be upheld as against the creditors who are not affected by the composition proceedings to cover property which they could reach, without going contrary to the provisions of the statutes 13 & 27 Eliz., as they have been expounded from the earliest times.

In the report of *Twyne's Case*, which is one of the earliest, it is said: "And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." 3 Coke, 82a. The reasons for this resolution have not ceased. The effect of this mortgage, with the purpose for which the orator says it was made, was to take the property from within the reach of the creditors and put it beyond their reach, unless they would compound their debts.

The mortgaged premises were the homestead of the mortgagor and his family. His wife joined in the mortgage, pursuant to the laws of the state, so as to bind the homestead interest. To the extent of the homestead exemption the mortgage was not fraudulent as to creditors, who could in no event reach that. The defendant Hawley's attachment, made before the mortgage, has been pursued to judgment for a larger amount than the writ required to be attached, and followed by a levy of execution.

The attachment of the Battenkill National Bank was made April 25, 1881; that of Franklin E. Lawrence, June 6, 1881; that of Thomas Fleming, August 27, 1881; and that of Jerome B. Bromley, February 18, 1882. All of these latter are still pending. Some question has been made about the validity of these attachments in the argument. But they are set up as good in the orator's bill, and could not well be attacked by him in the suit after that; if they were not, no fatal irregularity is apparent.

The *ad damnum* in Hawley's writ was raised to make it large enough to cover the judgment rendered. Some question is made as to the effect of this proceeding upon the attachment. But no new

cause of action could have been brought in by the amendment, for the law and practice of the state courts do not permit the introduction of a new cause of action in that manner. The attachment is founded upon the authority of the officer conferred by the command of the writ. It is measured by that command. In *Putnam v. Hall*, 3 Pick. 445, the command was made, by a slip of the pen, to be to attach, etc., to the value of \$6, instead of \$600. An amendment by inserting hundred was held to dissolve the attachment. No amendment in the case of Hawley is understood to have been made in this respect. The command of the writ was to attach the goods, chattels, and estate of the defendant to the value of \$1,500. The service of it created a lien upon the estate to the amount of \$1,500. The mortgage was made subject to this attachment, with others. It did not affect other creditors as to the amount covered by this attachment, but only as to the amount which would remain over. The mortgage is valid, therefore, to cover this amount, in addition to the homestead right, except as to Hawley, and as to him except for the 25 per cent. When the Battenkill Bank made its attachment it came next to Hawley's, and was good against the mortgagor and his property for the amount of the debt and costs within the amount commanded to be attached. The orator could meet it by paying the 25 per cent. of the debt. The mortgage was not fraudulent as to subsequent attaching creditors, except as to the property not covered by this attachment in addition to Hawley's.

It follows that the orator is entitled to a decree of foreclosure of the mortgage as to the homestead right against all the defendants; to a foreclosure against all but Hawley, of the value of \$1,500, covered by his attachment, and against him on payment of 25 per cent. of his debt, with interest from November 27, 1880; to a foreclosure against all but the Battenkill National Bank of the amount covered by its attachment, and against that on payment of 25 per cent. of its debt, with interest from the same day; and as to the residue of the estate he is not entitled to a decree against the creditors attaching subsequently to that attachment. This construction of these proceedings makes the mortgage, in the language of those statutes of Elizabeth, as adopted in Vermont, void only as against the party whose right, debt, or duty is attempted to be avoided. Rev. Laws Vt. § 4155. Hawley was promised \$125 for signing the composition. It may be thought that this should be provided for. But this was outside the composition, and the promise void even as to the party making it. *Case v. Gerrish*, 15 Pick. 50.

Let there be a decree of foreclosure, with costs of a foreclosure, without contest as to the homestead right, to the value of \$500, against all the defendants; as to the attachment lien of Hiram Hawley to the amount of \$1,500 against all but him, and against him on payment to the clerk for his benefit by the orator of 25 per cent. of his debt, with interest from November 27, 1880, with his costs; as to

the attachment lien of the Battenkill National Bank against all but that bank, and against that on payment to the clerk for its benefit of 25 per cent. of its debt, with interest from November 27, 1880, with its costs; that unless such payment be made within 30 days, the bill be dismissed as to them, respectively, with costs; that the bill be dismissed as to the residue of the estate, and the defendants Lawrence, Fleming, and Bromley, respectively, with costs.

LOVE v. PAMPLIN and others.

(Circuit Court, W. D. Tennessee. October 6, 1884.)

1. INDIAN TREATY—CHICKASAW TREATY OF JULY 1, 1834—TREATY OF PONTOTOC OF MARCH 1, 1833—EFFECT ON STATE LAWS—CONSTITUTIONAL LAW.

Under the Chickasaw Indian treaty of July 1, 1834, as interpreted by the previous treaty of Pontotoc of March 1, 1833, to which it was a supplement, state legislation that interferes with the national rights of the Chickasaw Indians, while in possession of lands under the tribal organizations, is extra-territorial, and, so far as conflicting with rights secured by the treaty, unconstitutional; and rights once vested under the treaty are beyond the power of state legislation, even after the removal of the Indians.

2. SAME—REAL ESTATE—CONVEYANCE OF INDIAN RESERVATIONS

It was competent for the United States by treaty, notwithstanding any state law, to prescribe the conditions to the conveyance of Indian lands which should be the law of the title. But on the extinguishment of the original Indian title, and the removal of the Indians from the state, the laws of the state would come into operation, except so far as modified by the existing treaties and laws of the United States.

3. SAME—VOLUNTARY AND INVOLUNTARY CONVEYANCES.

The restrictive clauses of the foregoing treaties upon the alienation of Indian lands provided that the reservations to individuals should not be "sold, leased, or disposed of" except in the particular manner pointed out by the treaty, but the terms of the treaty apply only to voluntary conveyance by the Indians, such as were effected by the personal will of the possessor, and not to transmissions of title by operation of law, except where provision is especially made for a peculiar descent on the death of the possessor.

4. SAME—ATTACHMENT SALE OF INDIAN LANDS.

Where, therefore, the possessor of an Indian reservation of individual lands left his land and rejoined his tribe in the Indian nation, in consequence of which absence from the state the land was attached at the suit of his creditor and sold by the sheriff, the purchaser at the sale took a good title, which must prevail over the claim of title by his heirs at law, under the tribal laws of descent or the ordinary laws of the state.

In Equity.

Poston & Poston and Lowry W. Humes, for plaintiff.

Wright & Folkes, R. D. Jordan, W. S. Flippin, and George Gantt, for defendants.

MATTHEWS, Justice. As originally commenced in the chancery court of Shelby county, Tennessee, this suit was a bill in equity to recover possession of real estate lying in that county, to which the plaintiff claimed the legal title. In that form it could not be main-

tained in this court, the remedy of the plaintiff being at law. The case is one that arises under a treaty of the United States with the Chickasaw tribe of Indians, and on that ground was removed from the state court, and in this court, by stipulation of parties, has been converted into an action at law for the recovery of the land in question, and submitted to the court, without the intervention of a jury, upon an agreed statement of facts.

The treaty under which the case arises was concluded May 24, 1834, and proclaimed July 1, 1834, between the United States and the Chickasaw Nation of Indians. 7 St. 450-457. As it was supplementary to the treaty of Pontotoc, negotiated between the same parties in October, 1832, and ratified March 1, 1833, it is necessary to bring into view the principal provisions of the latter to understand rightly the meaning of the former. 7 St. 381-391.

By the treaty of Pontotoc the Chickasaw Nation ceded to the United States "all the land which they own on the east side of the Mississippi river, including all the country where they at present live and occupy." This land the United States agreed to survey and sell as other public lands, and as a compensation therefor to pay to the Chickasaw Nation, from time to time as received, all the net proceeds of such sales. This cession was made in view of a removal of the Indians to a new home west of the Mississippi river; but they were not to be deprived of the comforts of a home in the country in which they were then living until they were provided for in the new possessions. In the mean time it was agreed that out of the surveys made by the United States each Chickasaw family should select and hold a comfortable settlement for cultivation, the uninterrupted use and possession of which, until a new home was found, was guaranteed by the United States, after which these reserved tracts were to be sold and accounted for as the rest. By an explanatory article of this treaty it was further provided "that no family or person of the Chickasaw Nation who shall or may have tracts of land reserved for their residence, while here, shall ever be permitted to lease any of said land to any person whatsoever, nor shall they be permitted to rent any of said land to any person, either white, red, or black, or mixed blood of either." It was also provided "that whenever the nation shall determine to remove from their present country, that every tract of land so reserved in the nation shall be given up and sold for the benefit of the nation. And no individual or family shall have any right to retain any of such reserved tracts of land for their own use any longer than the nation may remain in the country where they now are." By the ninth article of the treaty of 1832, "the Chickasaw Nation express their ignorance, and incapacity to live and be happy under state laws; they cannot read and understand them, and therefore they will always need a friend to advise and direct them." At their request, therefore, the United States agreed to keep an agent with them, as theretofore, "so long as they live within the jurisdiction

of the United States as a nation, either within the limits of the states where they now reside or at any other place." It was also stipulated that when the Chickasaw Nation should determine to remove to new homes, the United States should advance the necessary means for their transportation, and for one year's subsistence after they reach their new homes, payable out of the proceeds of the sales of the ceded lands; and provision was also made that a principal sum arising from the sales should be permanently invested and held by the United States for the benefit of the Chickasaw Nation, the interest on which might be applied for their national purposes.

This is the substance of the most material provisions of the treaty of Pontotoc, to modify which the treaty of 1834 was negotiated. The latter recites that "the Chickasaws are about to abandon their homes, which they have long cherished and loved; and, though hitherto unsuccessful, they still hope to find a country adequate to the wants and support of their people somewhere west of the Mississippi, and within the territorial limits of the United States." Another article (the third) declares that "the Chickasaws are not acquainted with the laws of the whites, *which are extended over them;*" and complains of intrusions into their country and upon their rights, which can only be restrained by the military force of the country, which they are unwilling to ask for or see resorted to, and therefore only stipulate that the agent of the United States residing among them will resort to every legal civil remedy to prevent intrusions upon the ceded country, and remove the trespassers from selected reservations; and that, if property be taken by persons of the United States, the agent shall pursue all lawful civil means, which the laws of the state permit in which the wrong is done, to regain the same, or to obtain a just remuneration; and in default thereof the United States will make payment for the loss sustained.

Article 4 provides as follows:

"The Chickasaws desire to have within their own direction and control the means of taking care of themselves. Many of their people are quite competent to manage their affairs, though some are not capable, and might be imposed upon by designing persons. It is therefore agreed that the reservations hereinafter admitted shall not be permitted to be sold, leased, or disposed of, unless it appear by the certificate of at least two of the following persons, to-wit, Ish-ta-ho-ta-fa, the king; Levi Colbert, George Colbert, Martin Colbert, Isaac Alberson, Henry Love, and Benj. Love, of which five have affixed their names to this treaty, that the party owning or claiming the same is capable to manage and to take care of his or her affairs; which fact, to the best of his knowledge and information, shall be certified by the agent, and, furthermore, that a fair consideration has been paid; and thereupon the deed of conveyance shall be valid: provided, the president of the United States, or such other person as he may designate, shall approve of the same, and indorse it on the deed; which said deed and approval shall be registered at the place and within the time required by the laws of the state in which the land may be situated; otherwise, to be void. And when such certificate is not obtained, upon a recommendation of a majority of the delegation and the approval of the agent, at the discretion of the president of the United States, the same

may be sold; but the consideration thereof shall remain a part of the general Chickasaw fund in the hands of the government until such time as the chiefs, in council, shall think it advisable to pay it to the claimant, or to those who may rightfully claim under said claimant, and shall so recommend it." 7 St. 451.

By the fifth article of this treaty the fourth article of the treaty of Pontotoc was changed so as to grant reservations in fee to heads of families proportioned in the number of sections to the size of the families, respectively; and by the sixth article, similar reservations of a section each to persons not heads of families, a list of which was to be made by the seven persons named in article 4. It was further provided that "in these and in all other reserves where the party owning or entitled, shall die, the interest in the same shall belong to his wife, or the wife and children, or to the husband, or to the husband and children, if there be any; and in cases of death, where there is neither husband, wife, nor children left, the same shall be disposed of for the general benefit, and the proceeds go into the general Chickasaw fund. But where the estate, as is prescribed in this article, comes to the children, and, having so come, either of them die, the survivor or survivors of them shall be entitled to the same. But this rule shall not endure longer than for five years, nor beyond the period when the Chickasaws may leave their present for a new home." 7 St. 452.

On November 16, 1840, a patent was issued by the United States to George G. Allen in fee-simple for two and a half sections of land, embracing the tract in controversy in this suit, which recites that the grantee was entitled to it under the fifth article of the treaty of 1834. It is admitted that Allen was a Chickasaw Indian, and that he was in possession of these lands until he removed into the Indian country in 1845 and rejoined the tribe, which had gone there in 1834. He died in the Indian territory many years ago, but in what year does not appear, leaving Elsie, his daughter and only child, his heir at law. She married the plaintiff, Henry Love, also a Chickasaw Indian, both of whom always resided in the Indian territory until Elsie died, in 1877, leaving no will and no issue. The plaintiff, as her surviving husband, claims under the tribal laws to be her heir at law, and as such claims the land in controversy; it being admitted that George G. Allen, in his life-time, never parted with his title by any voluntary conveyance or disposition thereof.

The defendants in possession claim title by sundry mesne conveyances from Allen and Apperson, who, it is also claimed, acquired the title of George G. Allen by a deed purporting to convey the same, made to them by the sheriff of Shelby county, Tennessee, within which the land lies, dated April 12, 1849. This deed was made in pursuance of a sale on September 4, 1848, under an execution in favor of Allen and Apperson against George G. Allen and his wife, founded on a judgment in an attachment suit in the circuit court of Shelby county,

rendered May 8, 1848, at which the plaintiffs in the execution were purchasers. George G. Allen, it is admitted, was not personally served with process in the action, and did not voluntarily appear, but the attachment was levied on the lands in question, and the defendants were notified by publication. It is not questioned but that the proceedings in the attachment suit were in all respects regular, and in conformity with the laws of Tennessee; but it is objected that they are void *ab initio*, and cannot be the legal basis of a title to the land in controversy, for the reason that, by the terms of the treaty with the Chickasaws of 1834, this land, in common with all similar reservations, was withdrawn from the jurisdiction and process of the state courts, and from the operation of all state laws affecting the title to it. As a matter of fact, by direct and express legislation on the part of Mississippi and Tennessee, the laws of those states respectively had been extended over the territory occupied and owned by the Chickasaw Nation, in respect to all persons and property therein prior to the removal of the Indians beyond the Mississippi river; with what effect, after that event, is the very question for determination in this case.

This legislation, it must be admitted, on the authority of the decision of the supreme court in the case of *Worcester v. State*, 6 Pet. 515, so far as it interfered with the national rights of the Chickasaw Indians while in possession of the lands under their tribal organization, was extraterritorial, and, so far as it conflicted with rights secured by any treaty or law of the United States in pursuance of the constitution, was unconstitutional and void. And any such rights, once vested, became fixed and irrevocable, and beyond the reach of state legislation, even when, by the extinction of the Indian title on the removal of the tribe beyond the state limits, the legislative authority of the state had become acknowledged and exclusive. It was competent, therefore, for the United States, by the treaty of 1834, to affix conditions to the conveyance of the reservations created by it, which should be the valid law of the title, notwithstanding any conflicting state law. *Smith v. Stevens*, 10 Wall. 321. But after the extinguishment of the original Indian title and the disappearance from the state limits of the tribal organization by the removal of the body of Indians, or otherwise, the law of the state would come into full operation and effect over persons and property within the former limits of the Indian nation, except as modified by vested rights under existing treaties and laws of the United States. It follows, therefore, that after the migration of the Chickasaw Nation west of the Mississippi river in 1834, the laws of Tennessee came into full effect over persons and property of the individual remnants found thereafter within the territorial limits of the state, including, consequently, the lands now in controversy, subject, however, to any rights secured by treaty with the United States. In all cases not provided for by the latter, the law of the state will apply and govern, and the treaty

and local law must be construed together, so that both shall stand as far as they can be reconciled; the law of the treaty prevailing in case of unavoidable conflict.

It becomes a question, therefore, in the first instance, of the true meaning of the treaty, and, looking at its provisions in the light of the circumstances, and of the natural and obvious meaning of the language in which they are expressed, and of the context, it appears to be clear that the intention of the instrument limits the clauses restrictive of alienation, as to the lands reserved to individuals, to cases of voluntary conveyances. The language of the prohibition is that the reservations shall not be "*sold, leased, or disposed of*;" and, although the words last used, "*disposed of*," might seem to embrace other dispositions than those of sale and lease, yet they cannot, upon the principle *noscitur a sociis*, be extended so as to include any other than those of a character like those specially named; that is, of a voluntary nature, effected by the personal will of the possessor. This seems to be rendered quite certain by the requisition that limits the qualification to cases of deeds of conveyance on which the approval of the president of the United States must be indorsed; and that deed, when properly executed and approved, is made subject to the registry laws of the state in which the land may be situated. Besides this reference, there are others in the treaty which seem to assume and declare the prevailing force of state laws, where not interrupted by the supreme authority of the United States. Article 3 declares the submission of the Indians to that condition as a necessary result of their situation; complaining, it is true, that they are not acquainted with the laws of the whites, which, nevertheless, are extended over them, and asking the interposition of the United States not to displace those laws by force, but only such redress for wrongs done them as those laws permit, and, on failure of justice from that source, compensation by the government of the United States. And the special rules for the transmission of the reservations by descent in case of death is limited in article 6 to a period terminated by the migration of the Indian nation to new settlements, and not to exceed five years in any event.

It was certainly contemplated, as part of the scheme provided for by the treaty of 1834, that the owners of reservations, at least such as chose to remain on them after the migration of the tribe, should be capable of transacting business and of making all necessary contracts to that end. It is a consequence of that supposition that they might render themselves liable to suit, which could be, of course, only according to the laws of the state in which they resided and contracted. And this involved the contingency of subjecting their lands, held by them, as in the present case, by a fee-simple title, to levy and sale on mesne and final process, as in case of other lands of like nature held by all other persons. Such a disposition of the reservations is not within the prohibition of the treaty, but, on the

contrary, by clear implication, is permitted by it. It follows, from these views, that the proceedings and sale in the attachment suit of Allen and Apperson divested the title of George G. Allen, the patentee, and are valid and effectual as a foundation of the title of the defendants. This conclusion is supported by express adjudications in the cases of *Lowry v. Weaver*, 4 McLean, 82, decided by the circuit court of the United States for Indiana, and of *Saffarans v. Terry*, 12 Smedes & M. 690, by the supreme court of Mississippi. And these are not inconsistent with any of the decisions cited and relied on by the counsel for complainant.

This conclusion renders unnecessary the consideration of any other question in the case. The bill is accordingly dismissed.

HAMMOND, J., concurred.

UNITED STATES v. ANONYMOUS.

(*Circuit Court, W. D. Tennessee.* October 6, 1884.)

1. CONTEMPT—REVISED STATUTES, § 725—INTERRUPTING EXAMINATION OF WITNESS—INSULTING THE EXAMINER.

It is a contempt of court to interrupt and violently break up the examination of a witness before an examiner by persisting in the claim to dictate, prompt, and control the answers of the witness. It is also a contempt to insult the examiner by the use of violent and abusive language to him after he has left the office and is upon the street. Nothing in the Revised Statutes, § 725, has taken away the power of the court to punish such contempts.

2. SAME SUBJECT—PRACTICE—ANSWER OF RESPONDENT.

Technically, the practice of a federal court of equity, in matters of extraordinary contempts, is to proceed, on motion and proof, by ordering that the offender stand committed, or be fined, unless he shall, on a day assigned, show cause to the contrary. But this practice has been superseded by converting a preliminary rule to show cause why an attachment should not issue into a procedure for trying the whole matter on its merits. But under neither practice is the answer of respondent to this rule or to interrogatories conclusive, as at law, in his behalf; but, on the contrary, the court will, for itself or by reference to a master, ascertain the facts by proof, taken in any way to suit the convenience of the court.

In an equity cause pending in this court, in which a large amount of written testimony in the form of depositions was to be taken in shorthand, a decree and order was made appointing the regular examiner of the court to take the proof of witnesses residing here, and many depositions had been taken by him; and others were being taken, when, on May 2, 1884, the examiner made a report to the court of certain alleged misconduct on the part of respondent, who was attending the examination of witnesses before the examiner in a law office in this city, the respondent being a defendant in said equity cause,

the guardian *ad litem* of certain other of the defendants and of counsel for the defense. The court thereupon, of its own motion, upon the presentation and filing of said report, directed the issuance of a rule upon the respondent requiring him to appear before the court on a day named therein and show cause in writing why he should not be punished as for a contempt of the court because of his alleged misconduct. By the same order the district attorney was directed to appear and prosecute on behalf of the United States. This rule was duly served by the marshal, as appears by his return under oath. On May 9, 1884, the return-day of the rule, the respondent not appearing or showing any cause in writing or otherwise, an attachment was ordered and issued for his arrest; and on the same day permission was given the district attorney to file affidavits of the examiner, of the facts set out in his report. These affidavits are as follows, omitting the mere formal commencement:

That the respondent, on—

"The first day of May, A. D. 1884, at Memphis, in the county of Shelby and state of Tennessee, and in the Western district of Tennessee, was guardian *ad litem* of certain defendants, and was also personally a defendant in said equity cause then and now pending in said court at said Memphis, and was then and now solicitor and counsel for the defendants therein, and that affiant was then and there and now an examiner in chancery for said court in said cause; that then and there, at the law office of P. & P., in said Memphis, the deposition of Mrs. D. was being taken for the defendants in said cause, she being a defendant and the mother of the said respondent, before affiant, as such examiner, in the presence of respondent and F., of counsel for defendants, and of E., of counsel for complainants; that after the direct examination of said Mrs. D. in her said deposition, and during her cross-examination therein, the said respondent (guardian *ad litem*, defendant, and counsel as aforesaid) did then and there interfere with and interrupt the said cross-examination by questioning, prompting, and conversing with the witness as to her testimony in the said deposition, and this notwithstanding the objection and request and protest of affiant, and the requests of said witness and said E. and F., on account of which conduct and misbehavior of the said respondent, and because he persisted therein and openly declared that he would not desist therefrom, the taking of the said deposition was interrupted and stopped, and counsel for defendants, the said F., because of said misconduct, left the office, declining to proceed with the deposition, after which said E. also retired, after requesting affiant to report the matter to the court; that after the said F. and E. had left said office, as stated, the respondent, in the presence of the said Mrs. D. and affiant, (then and there examiner, as aforesaid,) used indecent language of said E., calling him 'a son of a bitch' and 'a damned son of a bitch,' when affiant left the office to avoid listening to such foul language in the presence of Mrs. D. Soon after, at the request of said F., affiant returned to the office, when said respondent, in their presence, repeatedly swore he would 'kill that God-damned son of a bitch,' (meaning said E.,) shaking his fist, in which he held an open knife, towards said E., who was then walking up the street at a distance from respondent, and probably not within hearing. Thereupon affiant refused to proceed with the taking of depositions in said cause under such circumstances, when said respondent cursed affiant and told him to 'go to hell,' still holding in his hand the open knife. The interruption in the taking of said Mrs. D.'s deposition, and the reason why it was so left unfinished, was due wholly to the misbehavior

and misconduct of said respondent, he then and there being, as aforesaid, counsel, defendant, and guardian *ad litem* in said cause."

Under the process of attachment, the respondent was arrested by the marshal, and gave bail for his appearance, as in an ordinary criminal prosecution in the court; the amount of the penalty of his bond being fixed by the court at \$500. On May 20, 1884, the respondent filed, under oath, his response or answer to the report and affidavits of the examiner, which is as follows:

"For answer the said respondent says that it is true that he is guardian *ad litem* for certain defendants in said cause, and one of the defendants in said cause, and also one of the solicitors in said cause, and was such before and at the time of filing said affidavit. And he further says the affiant was then examiner in chancery for said court in said cause; that the deposition of Mrs. D. was being taken for defendant in said cause, the said examiner acting as such in taking the same; that she was one of the defendants in said cause, and the mother of respondent; that F. was also of counsel for said defendants in said cause, and E. was of counsel for complainants in said cause. It is true that the examination of said witness in chief was completed. But it is not true that after the direct examination of said Mrs. D., in her said deposition and during her cross-examination therein, that respondent did then and there interfere with and interrupt the said cross-examination by questioning, prompting, and conversing with the witness as to her testimony in the said deposition, and this notwithstanding the objection and request and protest of affiant, and the requests of said witness and said E. and F., and on account of which conduct and misbehavior, and because respondent persisted therein and openly declared that he would not desist therefrom, the taking of said deposition was interrupted and stopped; and counsel for defendants, said F., because of said misconduct, left the office, declining to proceed with the deposition. It is true that said F. did retire pending said cross-examination. It is true that afterwards said E. did retire, and that before retiring he requested said examiner to make report of the proceedings to the court. But it is not true that respondent was guilty of any act or conduct contrary to the form of the statute of the United States in such cases made and provided. Respondent, as counsel in said cause, upon said cross-examination, was of opinion that the cross-examining counsel was transcending the limits of legitimate cross-examination, and was seeking to entrap and confuse the witness, and to confound what she knew of her own knowledge with what she knew from hearsay; and he made, as he thought he had a right to do, objection to such examination as the objectionable questions were propounded, and sought, as he believed in a proper mode, to have them corrected; and he and his associate counsel differed as to whether the proper practice was to have such matters corrected as the examination proceeded, or to wait until the cross-examination had been concluded, and then by re-examination to undertake to have the necessary explanations and corrections made.

"Respondent was firm and decided, but not offensive, in his view, to the examiner, to said E. or to said F., and because of this position of respondent, which said F. believed wrong and would be hurtful to the case, or, at least, productive of no good, said F. declared if respondent did not yield and come over to his view that he would retire and leave respondent alone as counsel for defendants to continue the further examination of the witness; and said F. did accordingly leave, for the causes stated by respondent, and not for the causes stated in the affidavit of the examiner. After he retired said E. also retired, for the causes stated by respondent, and not for those stated by the examiner, and requested the examiner to report the matter to the court. Re-

respondent denies that in this matter he showed any contempt or want of respect for the authority of the examiner, or any want of respect or contempt for the court, under whose authority the examiner was acting. He denies all purpose whatever of contempt, or of defying the authority of the court or its examiner, or the due and proper execution of its orders. He thought that his action as counsel in the matter was proper and in good faith, urged it, and in so doing differed with his associate for the defense, for whom he then entertained and now entertains the warmest regard. It was not his purpose to wound or annoy him or the solicitor for complainants or the examiner, or to act in a spirit of disobedience or contempt for the court or its examiner, or its orders; and he disclaims, disavows, and positively denies that he entertained such purpose, or was guilty of any word or act which makes him a contemnor of the court or its examiner or its proceedings. He regrets that his disagreement with his associate counsel led to the suspension of the deposition, and to a total misconception of his motives and purposes. For further answer respondent says that after said F. and said E. had left the office of P. & P., as stated, and after it was announced that the further taking of the deposition was suspended, and said examiner had been requested to report to the court by said E., and the examiner had declared he would do so, respondent admits that he called said E. a son of a bitch, but not a damned son of a bitch; that the said Mrs. D. was then present, and respondent supposes the examiner was also present. But respondent meant no disrespect whatever to the examiner or to the court by the use of such expression. It may be that he ought not to have used it, and he is sorry that he did so in the presence and hearing of the said Mrs. D., and in the hearing of the examiner.

"Respondent supposes the examiner left the office of P. & P. at the time he states. What caused him to leave, respondent does not know. He had no further business there to detain him, and respondent supposes he was on the act of leaving anyhow. The examiner, after a time, did return to the said office, at the request of Col F., who had returned to the door of the office, and said F. and respondent were conversing on the subject of taking the deposition of another witness. Said F. and respondent desired to do so, and at the request of said F. the examiner returned, as already stated. He was politely requested to take the said deposition both by respondent and said F., but refused in an abrupt and angry manner, stating that he would not do so, and respondent felt stung and angry at his manner, believing that he meant to snub and offend respondent, and thereupon respondent grew angry and did say that he could go to hell. He meant, however, no disrespect to the examiner as an examiner of the court; but to the man who, requested politely to take a deposition, on the sidewalk in front of the office of P. & P. refused in a way intended, as respondent thought, to cut and wound him, he did make a reply which but for his anger he would not have made, and which he regrets. But he denies that in such answer thus made there was any contempt of court, or violation of any of the statutes of the United States. It was a hasty and passionate expression, not used in the presence of the court or of its examiner when the examiner was engaged in any duty imposed on him by the court. It is true that respondent was excited, and that he may have used the remark attributed to him in reference to said E., and may have had his knife in his hand at the time. But he did not mean to do what he said. He spoke from passing anger and passion, and said E. was not present and did not hear what was said. This did not occur in the presence of the court or of the examiner when in the discharge of his duties, but upon the sidewalk in Memphis, and was plainly not intended as contempt of court or a violation of any statute of the United States. Respondent solemnly avers that he had no purpose whatever to offer disrespect or contempt to the court or its examiner as the officer of the court in this matter; and having fully answered he prays to be dismissed," etc.

John B. Clough, Asst. Dist. Atty., for the United States.

George Gantt, for defendant.

HAMMOND, J. The claim of respondent that his answer shall be treated as conclusively true cannot be admitted. Procedure in matters of contempt differs in courts of law and equity; and again in the latter according to the character of the alleged contempt. There are two classes of contempts in a court of equity, known as *ordinary* and *extraordinary*, though in modern times they have been called, as by Lord Chancellor BROUGHAM in *Wellesley's Case*, 2 Russ. & M. 639, *civil* and *criminal*; as to which he says: "I agree that there may oftentimes be a difficulty in finding—*First*, authority for deciding where the line is to be drawn; and, *secondly*, instances in practice for drawing it." He then shows how the distinction has been applied in courts of law, from which indeed he takes the nomenclature, while that of the equity courts much the better expresses the distinction as it there prevails. It would be interesting, if profitable in this case, to trace the influence of this distinction between *civil* and *criminal* contempts (which Mr. Beames, in arguing that case, denied) in breeding from mere implication that interminable confusion which is found in the law of contempts.

In a court of law, because that court abhors any method of trial of issues of fact except by a jury, if the party denied his contempt on oath, he was released, and the parties were left to seek redress through indictment or action, where the facts could be tried according to the course of the common law. Blackstone thinks this was in favor of liberty, as it was, and therefore excuses the anomaly of trying a man on his own oath. 4 Bl. Comm. 287. Except, however, in determining whether a member of parliament should or should not be imprisoned for his contempt, this distinction between civil and criminal contempts, or ordinary and extraordinary contempts, was wholly immaterial. As to ordinary mortals, in a court of equity, the distinction was one wholly of procedure.

In ordinary or civil contempts there was only a controversy between the parties, not involving the element of offense to the court, or rather to the king, in the fact of disobedience; though, *technically* and *in form*, that element was the *gravamen* of all processes of contempt. In extraordinary contempts the existence in fact of disrespect of authority was punished as an offense. The one was merely remedial, the other punitive or disciplinary. That which was remedial was less summary in its operation, in the sense that it took longer to accomplish the remedial purpose, and the matter had to progress by certain stages; as attachment, attachment with proclamations, commission of rebellion, sergeant at arms, sequestration, *habeas corpus*, and, finally, *pro confesso*. But every one of these processes for arrest was issued without notice to the defaulting defendant upon whom *subpœna* had been served. The contempt was cleared, not by answer to interrogatories, but by doing the thing commanded, and

until that was done the contemnor was imprisoned on any of the processes which caught him. If, after decree, the proceeding was to compel obedience, he had a new notice by writ of "execution of decree," which must precede the other steps mentioned above. As to these contempts the books of practice treat with great fulness. 1 Newland, Ch. Pr. 67-98, 233, 380, 384, 388; 1 Daniell, Ch. Pr. (1st Ed. vol. 3, McKinley & Lescure's Law Library,) 572-700; Id. (5th Ed.) 488, 1045, 1063. Where a defendant in custody under any of these processes of contempt desired to contest the regularity of his imprisonment, he applied by motion or petition, supported by affidavits, to discharge him, to which the plaintiff could file affidavits in answer, and the court would decide the matter upon these affidavits, or, if in doubt, refer it to a master. 1 Daniell, Ch. Pr. 665, (1st Ed., *supra*.¹)

Having called attention to the division of ordinary contempts into such as are committed by non-obedience to the *subpœna* and such as are committed by a non-obedience to a decree or order, Mr. Daniell, in the first edition, tells us that "there is another species of contempt in which the dignity of the court is chiefly concerned, and which cannot be purged by mere satisfaction to the party, but may be the subject of punishment by the infliction of imprisonment or fine. These are called *extraordinary* contempts, and are the subject of peculiar modes of proceeding which will be pointed out in another part of this treatise." 1 Daniell, Ch. Pr. 572. Our author did not redeem this promise, for I cannot find that he returns to the subject to inform us about these peculiar modes of proceeding. But Mr. Newland, another author of repute, displays the practice with sufficient detail to determine the question we have in hand. Having told us that to beat the person serving any of these ordinary processes of contempt, or to use contumelious expressions against the court or its process, was a contempt, and that what he had said concerning the *subpœna* in that regard applies to all other process, orders, and decrees, he further observes that "the usual mode of proceeding against persons guilty of those and other contempts, not falling within the description of ordinary contempts, is by applying to the court that they may be committed upon affidavit and notice of the application. However, in some cases of contempts, as when they consist of contumelious words against the court or its process, and are proved by only one witness, the practice seems to be, not to commit the party in the first instance, but to grant an attachment against him, in order that he might be

¹NOTE. This edition is cited because it is nearest to the time when our federal equity rules were promulgated, and therefore the most reliable exponent of that practice to which we are bound by Equity Rule 90; Jones, Rules, 149; *Badger v. Badger*, 1 Cliff. 243. All subsequent editions, including the first American, are oftentimes misleading, because they are based on the second London edition, which was almost wholly rewritten in 1846, after Mr. Daniell's death, by Mr. T. E. Headlam, to conform the work to the very radical changes in English practice made after our equity rules were adopted.

brought in to be examined touching the contempt. In these cases, after the party is brought in, or appeared *gratis*, the prosecutor, upon notice thereof, files interrogatories for his examination. * * * If the party prosecuted for contempt denies it on his examination, or it does not clearly appear by his examination, the prosecutor may, if necessary, take out a commission of course to prove the contempt. The party prosecuted may cross-examine witnesses, and with leave of the court examine witnesses of his own. After these proceedings the court will decide whether a contempt has been committed or not, or will sometimes refer it to a master to certify whether the contempt be confessed or proved, or not." 1 Newl. Ch. Pr. 67, 392.

It is not always easy, however, to determine in practice to which of these classes a particular case may fall, and hence the practice is not uniform. Strictly, a court of equity, in a proceeding of the latter character, to which any misbehavior of the parties, attorneys, witnesses, jurors, or officers of the court, calculated to obstruct the efficient and orderly administration of justice in the given case, belongs, on its own motion, or that of the parties, proceeds to investigate *ex parte* the alleged contempt, and being satisfied thereof directs that the guilty person stand committed, unless he shall on a day assigned show cause to the contrary. This order *nisi* being served, if no answer be made the rule is made absolute, and the accused is then arrested and imprisoned according to its terms. If the accused appears, he is heard in any way that suits the convenience of the court, by an examination *ore tenus*, upon affidavits, or by propounding interrogatories. If he deny the contempt, the court, either for itself or by reference to a master, ascertains the facts upon the proof, either party examining witnesses by affidavit or otherwise. But there was never in a court of equity, as at law, any rule that the answer of the respondent to interrogatories should be taken as true and he discharged, if he denied the contempt. 1 Newl. Ch. Pr., *supra*; 1 Daniell, Ch. Pr. *supra*; Id. (5th Ed.) 1070, 1079, 1686; 5 Crim. Law Mag. p. 483, §§ 7-14, p. 508, §§ 27-30, p. 507, § 26, p. 513, §§ 32-37; 4 Bl. Comm. 288; 20 Amer. Law Reg. 147; 1 Bac. Abr. (Bouv. Ed.) 462; 2 Bac. Abr. (Bouv. Ed.) 633; *King v. Vaughan*, 2 Doug. 516; *Underwood's Case*, 2 Humph. 45; *Rutherford v. Metcalf*, 5 Hayw. 58; *McCredie v. Senior*, 4 Paige, 378; *Jackson v. Smith*, 5 Johns. 115; *Magennis v. Parkhurst*, 3 Green. Ch. (N. J.) 433; *Thornton v. Davis*, 4 Cranch, C. C. 500; *Parkhurst v. Kinsman*, 2 Blatchf. 76; *Whipple v. Hutchinson*, 4 Blatchf. 190; *Birdsell v. Manufg Co.* 1 Hughes, 59; *Worcester v. Truman*, 1 McLean, 483; *Gray v. Railroad*, Woolw. 63; *Fanshawe v. Tracy*, 4 Biss. 490; *Angerstein v. Hunt*, 6 Ves. 489; *Crook v. People*, 16 Ill. 534; *Buck v. Buck*, 60 Ill. 105.

But this method of procedure has, in modern practice, and since our federal equity rules were promulgated, fallen somewhat into desuetude, and has been superseded by substituting for an order of commitment *nisi* a rule to show cause why the party should not be

committed. This rule to show cause why an attachment should not issue, or an order of commitment be made, was a familiar one to both courts of law and equity, and was used where the evidence was not before the court as a mode of preliminary inquiry to determine whether any proceedings in contempt should be taken. It was, however, very conveniently converted into a procedure for determining the whole matter on its merits, and the court having the party before it proceeded, without technical practice, to try the entire question on this preliminary inquiry. Hence the answer of the respondent to such a rule in a court of law came to have the same effect as his answer to interrogatories in more regular practice. But no more in this modern practice than in that which is more technical can the respondent's answer be given that effect in a court of equity. 5 Crim. Law Mag. p. 494, §§ 8-12, 26; *In re Chadwick*, 1 Low. 439; *Hollingsworth v. Duane*, 1 Wall. C. C. 77, 102; *U. S. v. Wayne*, Id. 134; *Voss v. Luke*, 1 Cranch, C. C. 331; *U. S. v. Green*, 3 Mason, 482; *Thornton v. Davis*, 4 Cranch, C. C. 500; *U. S. v. Bollman*, 1 Cranch, C. C. 373; *Pitt v. Davison*, 37 N. Y. 235; 1 Tidd, Pr. 478-487. A few cases may be found so holding, but they are aberrations from the general line of authority and have not been approved. *Murdock's Case*, 1 Bland, Ch. 486, which cites *Childrens v. Saxby*, 1 Vern. 207, a case directly the other way; *Wells v. Com.* 21 Grat. 500, disapproved in *State v. Harper's Ferry Co.* 16 W. Va. 873. The cases cited by the respondent's counsel were all cases at law. *In re Edward S. May*, 1 FED. REP. 737; S. C. 2 Flippin, 562; *Re Pitman*, 1 Curt. 186; *U. S. v. Dodge*, 2 Gall. 313.

The next contention of the respondent is that our act of congress of March 2, 1831, c. 99, (4 St. at Large, 487; Rev. St. § 725,) has deprived the court of the power to punish for such contempts as that alleged against him. It is generally understood that the object of that statute, which has been substantially enacted in Tennessee (Code, § 4106) and other states was to enlarge the liberty of criticism by the press and others by curtailing the power to punish adverse comments upon the courts, their officers, and proceedings, as contempts which tend to impair respect for the tribunal, and thereby obstruct the administration of justice. *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 505; *Re Chiles*, 22 Wall. 157; *U. S. v. Holmes*, 1 Wall. Jr. 1; *State v. Galloway*, 5 Cold. 326; *Harwell v. State*, 10 Lea, 544; *Poulson's Case*, quoted 1 Kent, Comm. 301; 5 Crim. Law Mag. p. 177, § 25; *Stuart v. People*, 4 Ill. 395; *Ex parte Hickey*, 4 Smedes & M. 750; *Gandy v. State*, 13 Neb. 445; S. C. 14 N. W. Rep. 155; *Ex parte Edwards*, 11 Fla. 174; *Williamson's Case*, 26 Pa. St. 21; *State v. Dunham*, 6 Iowa, 245; *People v. Wilson*, 64 Ill. 195.

I do not find it necessary to go into the distinctions between direct and constructive contempts, which are so unsatisfactory to all who study this subject. There is always a struggle to relegate every contempt to the odious category of constructive contempts, in order to

take shelter under these restrictive statutes. But I may say that, in my judgment, the courts will find that the legislature has not taken away any valuable power, when these statutes are properly understood. Notwithstanding the seemingly formidable array of authority, it may be that, after all, it is a mistake to say that all contempts not committed in the presence of the court are constructive only. The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects besides the place where it happens. To print hostile comments on the court, its officers, or proceedings, as in cases where the question generally arises, or to ride one's horse into the tavern where the judge sleeps, as in *Com. v. Stuart*, 2 Va. Cas. 320, may be only constructively a contempt, as it very indirectly obstructs the course of justice, if at all; but where it takes the form of an assault upon an officer, as when he was beaten and made to eat the process and its seal, in *Williams v. Johns*, 2 Dick. 477, S. C. 1 Mer. 302, note *d*, the impediment to the efficient administration of justice may be quite as direct in its operation to that end, happen where it may, as if the party had ridden his horse to the bar of the court and dragged the judge from the bench to beat him. *Com. v. Dandridge*, 2 Va. Cas. 408; *People v. Wilson*, 64 Ill. 195. Be this as it may, wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court to become specific in its injury, by intimidating, or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors, and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be.

Lord ELDON was asked to commit a solicitor's clerk for breaking open the desk of another clerk, in the office of the register of the court. He said: "These officers are a part of the court itself; and if the register does not come forward the clerk has a right to protection in his own behalf." *Ex parte Burrows*, 8 Ves. 535. A messenger in bankruptcy was protected while on shipboard in charge of the goods. *Ex parte Dixon*, 8 Ves. 104. It is a contempt to insult a suitor and his solicitor while attending in the master's office, and the party will be attached at once on production of the master's certificate. *French v. French*, 1 Hogan, 138; *Ex parte Ledwick*, 8 Ves. 598; *Ex parte King*, 7 Ves. 312. A party was committed for terrifying a witness about to be examined at a commission. *Partridge v. Partridge*, Toth. 40. In Pennsylvania an examiner himself has power to punish a witness for contempt in refusing to obey his order, because it is a contempt of the process and not of the officer, (*Com. v. Newton*, 1 Grant, Cas. 453;) and in New York the refusal of a witness to answer

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the grand jury is a contempt "in the presence of the court." *People v. Hackley*, 24 N. Y. 74. Any contempt against commissioners deriving their authority from the great seal is punishable by the great seal. *Com. v. Hicks*, 1 Dick. 61. Commitment without rule *nisi* for an assault upon the messenger of the great seal while in discharge of his duty which was a contempt. This shows it was on the same footing as a contempt in the face of the court. *Elliot v. Halmarack*, 1 Mer. 301; *Ex parte Clarke*, 1 Russ. & M. 563. A party attending before an arbiter substituted for the master is entitled to protection. *Moore v. Aylet*, 2 Dick. 780. A peer, ordinarily privileged, for abducting a ward of the court was committed "for obstruction to the process of the king's court and contempt in the nature of obstruction to the king's court." *Wellesley's Case*, 2 Russ. & M. 639. A member of parliament was committed to the Fleet for sending a threatening letter to a master before whom he had a case pending, in which he was party, and counsel and the house of commons held he was not privileged. *Charlton's Case*, 2 Mylne & C. 316.

These cases show that such contempts are as aggravated as those directed at the court itself in open court, and, if there be two witnesses to the contempt, a rule *nisi* is unnecessary under the old practice. *Anon.* 3 Atk. 219. The contempt occasioned by the misbehavior of an officer of the court—and the same rule applies to the attorneys, parties, etc.—is not included in the prohibitions on the court of the act of congress of March 2, 1831. Rev. St. § 725; *Re Pitman*, 1 Curt. 186. It is a contempt to make a riot on a railroad, by strikers, while the road is in the hands of a receiver of the court. *Secor v. Railroad Co.* 7 Biss. 513; *King v. Railroad Co.* Id. 529. To curse a witness in the piazza of the court-house is a contempt "in the presence of the court," (*U. S. v. Carter*, 3 Cranch, C. C. 423;) and this notwithstanding the act of 1831. *U. S. v. Emerson*, 4 Cranch, C. C. 188. Here one was called a liar in the hearing of the crier and other officers of the court. It is a contempt for persons to leave the room "contrary to the express command of the bailiff." *Offutt v. Parrott*, 1 Cranch, C. C. 154. It is "an obstruction of justice" for a juror to form and express an opinion after service, in order to disqualify himself. *U. S. v. Devaughan*, 3 Cranch, C. C. 84. A witness before a grand jury refused to answer, and "behaved in an insolent manner and threatened some of the jurors;" held a contempt. *U. S. v. Caton*, 1 Cranch, C. C. 150. A contempt of a register in bankruptcy is a contempt of the court itself. *Re Allen*, 13 Blatchf. 271; *Re Speyer*, 6 N. B. R. 255. And so it is a contempt for a party to refuse to obey a referee's order to allow a witness to see books produced upon an order of the court; and a statute authorizing referees to punish for contempt does not deprive the court of its concurrent power over such contempts. *Sudlow v. Knox*, 4 Abb. App. Dec. 326; *Re Seeley*, 6 Abb. Pr. 217; 5 Crim. Law Mag. p. 159, §§ 7, 27.

The privilege of protection to all engaged in and about the business of the court from all manner of obstruction to that business, from violence, insult, threats, and disturbance of every character, is a very high one, and extends to protect the persons engaged from arrests in civil suits, from service of process, etc. It "arises out of the authority and dignity of the court," and may be enforced by a writ of protection, as well as by punishing the offender for contempt. A master, examiner, referee, or commissioner acts under the authority of the court when he makes a lawful order, and the order need not be a written one. *Bridges v. Sheldon*, 7 FED. REP. 17, 42, 45. Attorneys are officers of the court, and are, like parties, witnesses, jurors, and the officials, entitled to protection, and are subject especially to the power of the court to compel them to behave themselves with propriety in such matters as pertain to the business of the court in all its ramifications. *Ex parte Garland*, 4 Wall. 378; *Ex parte Bradley*, 7 Wall. 374; *Ex parte Paschal*, 10 Wall. 491; *Ex parte Wall*, 107 U. S. 265; S. C. 2 Sup. Ct. Rep. 569; *Re Woolley*, 11 Bush, 95; *Ex parte Cole*, 1 McCrary, 405; 5 Crim. Law Mag. p. 186, §§ 30, 31; *Weeks*, Attys. 180-188; *Weeks*, Dep. p. 143, § 120.

A witness cannot refuse to answer the examiner because the question is irrelevant or improper, his remedy being by a demurrer to the interrogatory to take the opinion of the court. 5 Crim. Law Mag. p. 185, § 29, and notes; 1 Daniell, Ch. Pr. (5th Ed.) 942; *Re Judson*, 3 Blatchf. 148. But the contempt may be excused if the witness honestly acts under the advice of counsel. *Roberts v. Walley*, 14 FED. REP. 167. But it is contempt for counsel to advise a witness not to answer, and a more serious contempt to prompt a witness in his answers. *Re Eldridge*, 82 N. Y. 161; *Heerdt v. Wetmore*, 2 Rob. (N. Y.) 697; *Com. v. Feely*, 2 Va. Cas. 1.

These authorities show most conclusively that whatever may be the restrictions imposed by our statute, they certainly have no application to a case like this, involving the conduct of a party to the suit, who is at the same time an attorney in the case, towards an officer of the court, in a proceeding before him had in the case itself. Indeed, it falls within the permissive language of the statute. If the "misbehavior" was not "in the presence" of the court, or "so near thereto as to obstruct the administration of justice," it was "the disobedience or resistance" by "an officer," and "a party" to "a lawful order, decree, or command" of the court. Rev. St. § 725. The order of the court was that the proof should be taken before this examiner, and respondent's conduct was well calculated to, and did, in fact, "obstruct the administration of justice" by impeding the examination of a witness. Nor is the case any better for respondent on his own showing, ingeniously contrived as the answer is to evade the force of the facts as they are admitted to be. Neither the report of the examiner and the affidavits, nor the answer of the defendant, describe with sufficient precision the acts of the respondent; but it suf-

ficiently appears from the language admitted to have been used, and the conduct of the persons engaged about the business, in leaving the disgraceful scene, to have been of that violent character which justified the examiner, the associate and opposing counsel in their protests against it. It was impossible to proceed with the business unless by submission to respondent's violent and imperious will. This is wholly inconsistent with the avowed error of judgment and absence of intentional disrespect for the authority of the court. It is thoroughly well settled that the avowal of such respect cannot weigh against the plain implications of the conduct itself. *Re May, supra; Wartman v. Wartman*, Tan. Dec. 362, 370; *People v. Freer*, 1 Caine, 485, 518; 5 Crim. Law Mag. p. 510, § 29. Counsel and parties have ample opportunity, by interrogatories and counter interrogatories, to have a witness explain his answers, or the witness may, as we have seen, seek the protection of the court by demurrer; but all testimony would be of little value if counsel or parties be permitted to dictate, prompt, or otherwise control the answers; and it is, as we have seen, a contempt to do this, even where there is no exhibition of violence and contemptuous conduct, as in this case.

Again, while the language used about the opposing counsel was not, in his absence, a contempt, although the attorneys are as much under the protection of the court from violence, insults, and threats as any other official, the conduct of the respondent towards the examiner was a gross contempt of this court, and it can have no toleration for the distinction assumed by counsel between the man and the officer. No such distinction exists in the law, as shown by perhaps the ablest case on the law of contempts to be found in the books. *Com. v. Dandridge*, 2 Va. Cas. 408; *Fitler v. Probasco*, 2 Brown, (Pa.) 137. Besides, the respondent does not aver any other cause of complaint against this officer than such as he had growing out of their official relations to the transactions of this case. If respondent had shown facts *aliunde* that relation to provoke, however unnecessarily, his violent language, there could have been no contempt of this court, of course. But in their official relations to the case both are under the protection and privilege of the court, while engaged, as they then were, about the business of the court, from all contumely, insult, and violence towards each other. Altogether, the proof shows, on the part of the respondent, a reckless disregard of the ordinary proprieties of the occasion, and of the authority of the court, too serious to be overlooked by the most indulgent court.

In all cases of the kind the courts are troubled about the penalty to be imposed for the contempt. Ordinarily, courts of equity meet such defiance of their authority by imprisonment, which the conduct of respondent richly merits. But the court has observed in the progress of this case that the respondent is not a man of cool head or cool temper. Unfortunately, he has undertaken the always doubtful task of representing himself as counsel in an acrimonious litiga-

tion, in which, in every possible sense, he is deeply interested as party, witness, guardian, etc. Naturally, his feelings are intensely involved, and in all litigation of this kind, certainly in this, much occurs calculated to exasperate the feelings of a man of the temperament described. That any such cause existed on this occasion does not appear; but, yielding to this consideration of the infirmities of human nature, the court has determined to impose only a fine. The judgment of the court, therefore, is that the defendant be adjudged guilty of contempt, and that he pay a fine of \$50 and the costs of this proceeding, and that he stand committed until the fine and costs are paid.

Decree accordingly.

VICKREY v. STATE SAVINGS ASS'N.¹

(Circuit Court, E. D. Missouri. October 13, 1884.)

NEGOTIABLE INSTRUMENTS—BANKING DEPOSITS FOR COLLECTION.

Where a negotiable instrument, indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank for "collection and credit" before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks.

This is a suit for the proceeds of a promissory note deposited by the plaintiff, indorsed in blank, with the Indianapolis Banking Company at Indianapolis for collection, and transmitted by that company to the defendant at St. Louis, where it was payable, with the direction to "collect and credit" it to the Indianapolis Banking Company. It was collected and credited accordingly, without knowledge on the defendant's part that, at the time the note was received, the plaintiff had any interest in it. The balance against the Indianapolis Banking Company was then and still remains greater than the amount of the note.

Finkelnburg & Rassieur, for plaintiff.

H. D. Wood, for defendant.

BREWER, J. I think the defendant is entitled to judgment. The facts bring the case within the rules laid down in *Bank Metropolis v. N. E. Bank*, 1 How. 234; S. C. 6 How. 212; *Sweeny v. Easter*, 1 Wall. 166.

The Indiana bank was the apparent owner of the paper, made so by the unrestricted indorsement of the plaintiff. It forwarded the paper to the defendant for collection and credit. The defendant had

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

no notice of plaintiff's title, or reason to suppose that the Indiana bank was not the owner. For more than a score of years the two banks had had mutual dealings in paper, large amounts passing between them for collection. Out of these dealings sprang balances, sometimes in favor of one bank and sometimes in favor of the other. Collections were not remitted, but simply passed to the credit of the transmitting bank, and to be settled by the proceeds of other collections sent to such bank. Statements of account and balances were periodically exchanged. Under these circumstances, it is fair to hold that the balances were by each bank permitted to remain upon the credit of remittances made or contemplated in the usual course of dealing between them. The testimony of the assistant cashier of defendant, that it believed the Indiana bank solvent and trusted it accordingly, does not conflict with this; it simply indicates what might be expected, that the defendants would not hold as a correspondent a bank in whose solvency it had no faith.

So far as any hardship on the plaintiff is concerned, he has no one but himself to blame. By a restricted indorsement he could have given notice to every one of his title. He chose to give an unrestricted indorsement, and thus permitted it to pass into the channels of trade as apparently the property of the Indiana bank. He trusted that bank, and must abide the consequences of his confidence. That the indorsement to the defendant was for collection is immaterial. The question in these cases is not whether title is apparently transferred to the collecting bank, but whether it has a right to treat the transmitting bank as the owner. It had such right in this case, and therefore judgment will be entered in favor of defendant.

DE FRANCA and others v. HOWARD.¹

(Circuit Court, E. D. Missouri. September 27, 1884.)

1. DESCENT AND DISTRIBUTION—ALIENAGE—CHAPTER 110, §§ 2 AND 4, GEN. ST. MO. 1866, CONSTRUED.

Under the provisions of chapter 110 of the General Statutes of Missouri of 1866, where there is an intervening estate less than the fee limited by will to a devisee, aliens, who, but for their alienage, would inherit the remainder, have power to dispose of the interest which they would inherit if they were citizens, to parties capable of taking, at any time prior to the expiration of three years after the expiration of the intervening estate.

2. CONSIDERATION—IMPLIED WARRANTY OF TITLE.

Semble, that in such cases a contract by aliens to convey their interest in an estate which they are supposed to have, but have not in fact the right to dispose of, is sufficient consideration for a contract to pay for the conveyance, and the supposed possessors of the power are not bound, in the absence of fraud, to make good their right in order to recover the amount agreed to be paid.

At Law.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

This is a suit upon a contract between plaintiffs and the defendant, whereby the former agreed to convey to the latter their interest in certain lands, situated in Missouri, in consideration of the sum of \$5,250; \$250 cash, balance to be paid upon delivery of a deed. The tender of a deed is alleged, and judgment for the unpaid balance of the purchase money asked.

W. H. Clopton, for plaintiff.

Henry M. & Freeman A. Post, for defendant.

MILLER, Justice, (*orally*.) The case of *De Franca and others* against *Howard*, which was heard upon Wednesday, will be disposed of this morning. I do not think it necessary to say much about it. De Franca died, the owner of certain property, which the plaintiff sold to the defendant. By a written contract the defendant agrees to pay \$5,000 for it, in addition to \$250 earnest money, which he had already paid. His contract was in writing, executed by both parties, and not denied by either of them. It is now argued by the defendant, in the first place, that the plaintiffs were not the heirs of De Franca as to this property, and therefore that the defendant got nothing by his contract. It is probably a sufficient answer to that to say that the plaintiff did not covenant to convey a title. They covenanted to convey their interest as the heirs of De Franca. I think, probably, that is not a covenant that they were the heirs of De Franca. At all events they bear such relation to him that they had something of value to sell, if they were not the legal heirs. It is perhaps proper to say that the objection—the main objection—is that they are aliens.

I shall not go into the testimony, because I think it is perfectly plain that these plaintiffs, if they had not been aliens, if they are not barred by the law of Missouri on the subject of alienage, have established the fact that they are the only living next of kin of De Franca. As a fact, we both find that without any hesitation. That being established, it is also a fact that they are aliens, and were at the time of De Franca's death.

De Franca made a will and left a wife. Apart from that will and that wife, these plaintiffs are the persons who, if they were not aliens, would inherit the real estate which they sold to Howard. The will of De Franca very distinctly gives to his wife a life-estate in this property, and places the title of that life-estate in Mr. Price for the use and benefit of that wife. The wife was insane, and is insane now. My opinion is that the result of that will was, as a matter of law, that—unless she or some one for her had asserted her right to a larger estate, which is not in controversy here, nobody saying anything about it whatever—my opinion is that the effect of that will is to limit her interest in the property to a life-estate, and that when she dies nobody can inherit that life-estate or can take anything through her title to that estate; that that is the interest and the only interest she has in it, or had on his death, unless she had resisted the

will. That leaves, then, the remainder of that estate after her death as the subject of consideration as to what became of it.

I understand the law of Missouri to be that an alien who cannot inherit or cannot hold property has a right within three years from certain events to convey the title, or such title as he could have taken if he had not been an alien. He must do that, however, within three years from certain events. Counsel for defendant introduced evidence to show that the administration of the estate of De Franca was closed in 1869, and he insists that from that date the three years of limitation within which these alien descendants or collaterals of De Franca must have made the deed began, and that as they did not deed it within three years they had no power, and their deed conveyed nothing, and that there was an absolute want of consideration for the contract now sued on. As regards the particular date from which the three years must commence running, that contention is correct if there is no other estate intervening; but the statute fixes other times and other incidents indicating the date from which the three years commence running. One of them, in the clearest possible language, is the existence of "some other estate less than the fee-simple estate in another party than an alien," which, when it is terminated, the three years begin to run. Very well. As a matter of law, then, we hold that until the life-estate of the wife of De Franca terminates by her death, no bar, no three years, nor any other hindrance arises to prevent these alien heirs (I do not use the word "heirs" correctly, because they are not heirs, but next of kin) of De Franca from conveying the interest that will result to them when that death comes.

The statute itself and its policy is a very clear one. It means that so long as the estate, the title, is in any body who is not an alien, and who by law can inherit or receive by devise title to land in the state of Missouri,—so long as that title is in anybody, no bar begins to run; but when that title has ended and the next person to take is an alien, that that person cannot take a fee-simple to himself, nor can he hold it when devolves on him any right or title to it, or whatever you may call it, longer than three years; but that within that three years, and any time before the expiration of three years, the law vests in him a power of appointment by which he can sell and convey the title which would come to him if he were not an alien, to any other person who is capable of taking and is not an alien, and who, under the laws of Missouri, can take and hold title. The result of this is that these parties had until three years after the death of Mrs. De Franca to make that appointment to convey that title to any person capable of taking it. They have done this in the case of Mr. Howard. They contracted to do it, and that contract was valid. They have proved that contract, and they are entitled to the money.

Judgment, therefore, will be given for the plaintiff, with the interest, for \$5,000.

Mr. H. M. Post, (of counsel for plaintiff.) As a matter of form we desire to enter our exceptions to the finding of the court.

The Court, (by Mr. Justice MILLER.) Let me do the best thing I can for you, Mr. Post. Exceptions to such a judgment as that do no good. These findings of law that you have asked me to find are not good. I cannot find and cannot sign a finding of facts that merely recites all that has been proved in this case; but the law says that the court may find the material facts on which the judgment rests, and if they do not justify the judgment you can take your writ of error on that and have it reviewed. In addition to that, you are entitled to show in your bill of exceptions that you excepted on the trial to the introduction of testimony. If you can make up a finding of facts suitable, on which you can agree among yourselves, I will be here until next Tuesday and sign it, as I want to give you a chance to take it up if you can. The main facts to be found are, simply, that De Franca died possessed of this property, having a title; that he made a will; that no other heirs have been found but these aliens; that they are the heirs, and that was for the court to find. I hold on both propositions the plaintiff is entitled to recover; that these plaintiffs had an interest such as they could sell, and which they did sell. I mean by that that they had the power, and that their conveyance conveyed the remainder after Mrs. De Franca's death. I hold, as a matter of law, whether they did or not, whether they were entitled to that thing or not, that the negotiations, the condition of the estate, the probability that Mr. Howard himself hunted up and found out that these were the real heirs, all that constitutes a matter of contract in which the heirs were not bound to make good their title, and which Mr. Howard took at his own risk. On both propositions of law I find for the plaintiffs. I never have volunteered much advice against my own judgments, but this is such a perfectly clear matter, both to Judge TREAT and myself, that I think Mr. Howard would be fooling away his money to prosecute the case further.

Treat, J. The effect of this judgment, Mr. Post, is this: Of course Mr. Howard has a perfect title, subject to that life-estate. It seems that he was advised differently by others, but this court has reached a different conclusion. He can take his deed, pay his money, and he has the title.

SEAMAN v. ENTERPRISE FIRE & MARINE INS. CO.¹

(Circuit Court, E. D. Missouri. September 25, 1884.)

1. INSURANCE—INSURABLE INTEREST OF STOCKHOLDER IN CORPORATE PROPERTY.

An owner of stock in a corporation has an insurable interest in the corporate property in proportion to the amount of his stock.

2. SAME—WHERE THERE IS A SHAM SALE.

This interest, though extinguished by a *bona fide* sale of the property, is not altered by a sham sale.

3. SAME—EVIDENCE.

The bill of sale and the enrollment of a steam-boat are *prima facie* evidence of a *bona fide* sale.

4. SAME—IMPLIED CONTRACT AS TO SEAWORTHINESS.

There is an implied contract on the part of the insured or an interest in a vessel for a particular voyage, that she shall be seaworthy when she leaves the port of departure, and that if she becomes unseaworthy while on her voyage the master shall use a reasonable discretion and have the defect remedied at the nearest convenient port.

5. SAME.

The necessity for haste in making repairs, in case the vessel becomes unseaworthy during her voyage, depends upon the character of the defect: the more serious it is the greater the necessity for prompt attention.

6. SAME—PRACTICE.

The question of whether or not reasonable diligence has been used in a given case is for the jury to decide.

7. SAME.

The fact that a vessel was unseaworthy when it left the port of departure, or became so afterwards, and due diligence was not used in having her repaired, will not prevent a recovery by an insurer in case of loss, unless the loss has been contributed to or caused by the defect.

8. SAME—PERILS OF NAVIGATION.

Perils in making landings are perils of navigation.

9. SAME—AMOUNT OF STOCKHOLDER'S INSURABLE INTEREST IN CORPORATE PROPERTY.

Where a party who owned three-sixteenths of the capital stock of a corporation insured his interest in the corporate property, *held*, that in case of loss he was entitled to recover the amount of his policy, up to three-sixteenths of the value of such property at the time of the loss.

Suit upon a policy of insurance upon a steam-boat owned, as alleged, by the C. V. Kountz Transportation Company. The insured vessel, while making the trip specified in the policy, accidentally struck the river bank, in attempting to make a landing, and was so injured that she sank and became a total loss. The other material facts and the points made in the defense sufficiently appear from the charge.

Madill & Ralston, for plaintiff.

Given Campbell, for defendant.

BREWER, J., (*charging the jury orally*.) This plaintiff claims to be the owner of 74 shares of stock or three-sixteenths of the stock of this company, and that, by reason of that ownership, he has or had

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

an insurable interest in this boat to that extent. His interest arises or arose by virtue of the fact that he owned the stock in the corporation, — the Kountz Transportation Company, — which corporation owned the boat. As the owner of the stock he had a right to insure his proportionate interest in the boat; that is, if he owned three-sixteenths of the stock he could insure three-sixteenths of the boat, and if the boat, at the time of the loss, belonged to the transportation company, he had an interest to be protected by this policy. It is claimed that there was a sale of that boat by the company prior to the loss. In support of that a bill of sale is produced. The enrollment is produced. *Prima facie* that bill of sale and that enrollment show that there was a sale; and when I say *prima facie*, I mean that if there were no other testimony in the case you would be bound to find that the boat had been sold by the transportation company, and that this plaintiff had no interest in the boat. But the plaintiff says, and the burden of proof is on him to establish what he says, that there was in fact no sale, no honest *bona fide* sale, by the transportation company. As a stockholder he would be bound by an honest sale, whether he liked it or not, and he must take, if such a sale was made, simply his interest in what was received; for you can very easily see, in that respect, that, if the company had sold the boat and gotten so much money, it would be unjust for him to have an interest in that money and still have an insurable interest in the boat which did not belong to the company and which did belong to a third party. So the question is whether this transaction, which took place in New Orleans, was by the company a *bona fide* sale. If it was a mere sham, a mere putting up of papers, a mere going through the form of a sale in order to place the apparent title in some third party to prevent seizure, or for any other reason, then that kind of a sale does not conclude him. Whatever might be true of the corporation, as a stockholder, he might say, I never authorized the president, or any other officers, to go through the form and trick of a pretended sale; that property still belongs to the corporation, — at least, so far as the protection of my interests are concerned.

I shall not review the testimony in detail as to what took place at New Orleans, nor endeavor to criticise or comment upon it. It is very full, and I think you will have no difficulty in arriving at a conclusion as to whether that was a sham sale, — a mere putting of the title in the name of an alleged purchaser, Charles B. Jones, for the sake of avoiding liabilities there, — or a *bona fide* sale of the property, vesting the title and ownership of the boat in C. B. Jones. In reference to such a transaction, generally, I may say that a sale cannot be consummated without the assent of the seller and the purchaser; I cannot force upon either one of you the title to property which I own, no matter what papers I may execute. You have a right to be consulted in the determination of the question whether you will take the title. But if there was at the time, with the assent

of the corporation through its president, who had authority to make a *bona fide* sale, and the assent of the purchaser to whom this sale it is claimed was made, an honest *bona fide* sale of the property, the rights of the plaintiff in the boat ceased, and your verdict must be for the defendant. If, on the other hand, it was a mere trick, a mere pretense, a mere going through with the form of a conveyance, without any intention that the property should be the property of the purchaser, an intention entered into and assented to by both seller and the purchaser, then it is no sale so far as this is concerned. As I said, or intended to say, and I repeat it in order that there may be no mistake about it, the enrollment and the bill of sale are *prima facie* evidence of the transfer of the title, and unless the testimony satisfies you that there was no *bona fide* sale, the verdict must be for the defendant.

The other question runs as to the accident itself. It is claimed by the defendant that this boat was not seaworthy when she left the port of departure, and not seaworthy at the time of the accident, and the question is, what is seaworthiness? because, as a matter of law, whether expressed or not in the policy, there is an obligation on the part of the boat—the owners of the boat—to see that when she leaves the port of departure she is seaworthy, and this plaintiff, although he may not have been an officer or present here to examine, yet is bound by that obligation. It is a part of the contract of insurance that the boat shall be seaworthy when it leaves the port of departure, which in this case was St. Louis. And that is fair when you stop to think of it a moment. The insurer has no possession of the property; in this case it is a corporation residing elsewhere, and it could not be present and examine the condition of every boat it insured. It is the duty of the owners to themselves see that it is seaworthy when it leaves the port of departure.

Now, what is seaworthiness? In order that a boat should be seaworthy it is not necessary that it should be provided with everything that would be convenient and pleasant to have on the boat in its voyage, but it is necessary that it should be provided with everything which will tend to make it reasonably safe for the voyage which it is intended to make. It will not do to say that because the thing can be done,—a voyage can be made without this or that,—that therefore a boat is seaworthy. Take an illustration outside of the river: A vessel crossing the ocean should be provided with its masts and rigging,—all the masts and rigging which that vessel ordinarily carries, which are reasonably necessary for the movement of that vessel; and while you and I may know, as a matter of fact, that many a vessel has been carried across the ocean safely with two-thirds of its masts and the bulk of its rigging gone, yet you cannot say of such a vessel, that it was seaworthy: it had not been put in that condition which prudent and reasonable seafaring men would require in order to encounter the perils and dangers which might be

expected. So, when this boat left the port of St. Louis, it should have been put in that reasonably safe and prudent condition which, having in view all the perils which might reasonably be expected it would encounter in the voyage, was sufficient to guard against those perils.

The particular complaint of the condition of the boat is the lack of the starboard wing rudder, and much testimony has been given before you as to the necessity of such a rudder, and its value in controlling the motions of the boat; testimony has also been offered to the effect that boats are built and managed without any wing rudders. Now, the question in that respect is, not whether a boat could be managed without any wing rudders, or with only one wing rudder, or whether other boats are constructed with only balance rudders, because, as you will remember, the testimony developed before you that there was some difference in the shape of the sterns of these different boats,—some with skaggs and some without. The question is whether, as to this boat, considering the size, the manner in which it was constructed, the size of the balance rudders, the amount of load which it might reasonably be expected to carry, the condition of the river, and the perils of the voyage it was to make, it ought reasonably and fairly to have had the four rudders at the time it left the port of departure, or anywhere along down the river. If you say, from the testimony, that the want of this starboard rudder did not materially affect the steerage power of the vessel, or prevent the pilot from maintaining good control over its motion, why, then, the omission of the rudder at the port of departure, or anywhere along the line, cannot be said to be a lack of seaworthiness; but, if that was a material factor, reasonably necessary, not merely when going down stream, or backing, but in the various contingencies which will arise in the course of a voyage,—if such fourth rudder was reasonably necessary in order to give the proper control of the boat to the pilot,—then the lack of such fourth rudder rendered the boat unseaworthy.

If you find that there was no need of that fourth rudder, that closes the question, you need not go any further; but if you find that that rudder was necessary to make it seaworthy, then the question comes as to the duty incumbent upon a boat, and its officers and owners, in respect to the voyage. The duty is absolute at the port of departure to see that it is seaworthy. If, after leaving the port of departure, the injury happens, then the master of the boat is vested with reasonable discretion. He is not bound, because some little defect happens, to stop his boat. If it was a sea voyage, he could not do it, perhaps; he is not always bound to turn to the nearest port; that will depend on the nature of the injury,—the extent which it affects the ability of the boat to make a successful voyage. He is bound to use a reasonable discretion, and, at the nearest convenient port, to remedy any defect which makes the boat unseaworthy. And what is the nearest convenient port depends upon the facts of the case;

what is the imperativeness of the necessity depends upon the extent of the injury. If it is a little matter, that affects but slightly the voyage or control of the boat, then the necessity for stopping is not so imperative as if the injury is such as wholly destroys the power of control; and it is for the jury in that respect to say whether the conduct of the master was reasonably prudent, if, after leaving the port of departure, and the accident happening after leaving the port of departure, he is informed of the injury.

You must not understand that it is his imperative duty to stop the moment he finds it out, nor is he at liberty to go on indefinitely without seeing it repaired. He must consider all the circumstances under which he is placed, the ability to repair the loss, the place where the loss can be repaired, the condition in which the boat is on account of the stage of water, the amount of load it possesses, the ability of the pilot to control the motion,—and the question is whether, taking all these things into consideration, he acted with reasonable discretion in the matter?

But then, suppose you find that the boat was not seaworthy at the port of departure, or that, becoming unseaworthy after it left the port of departure, the master did not exercise reasonable prudence in repairing the defect, the further question comes, whether the loss was owing to that defect. If the loss was in no manner owing to the defect, then it will be disregarded. Take this illustration: Supposing a boat starts off without sufficient rudders, but the loss comes from an explosion of the boiler, something in no manner connected with that defect, then the existence of the defect does not vitiate that policy. It is only where, there being a defect which makes the boat unseaworthy, that defect, either in whole or in part, causes the injury. So you go down to the time of the loss, and inquire from the testimony what caused it; was it mismanagement on the part of the pilot, or a failure of the engineer to obey the direction of the pilot,—a failing to back when he should have backed, and sending the boat forward? Was it because of the defect in the arrangement of the freight on the boat, so that it was not under the control of the pilot? Was it on account of the state of water? If it was solely caused by other matters than this alleged defect in the matter of the steering capacity, or want of a rudder, then the policy is holden, or the insurer is holden on the policy. It is only when the defect exists, and when it is one which, either in whole or in part, contributes to the loss, that the policy is void; and these are all questions of fact for you to determine.

In reference to them, summing them up briefly, let me say that the papers—the bill of sale and the enrollment—*prima facie* show a transfer of title. The plaintiff must show that the sale was fictitious and a sham. If he has done this, the whole thing may be disregarded, and his right to recover is not affected by that sale. *Second*, the question of seaworthiness is whether the boat was placed or continued in a

reasonably safe and proper condition for making the voyage which it was intending to make. *Third*, the master (if the defect rendering the boat unseaworthy you find occurred after leaving the port of departure) had a reasonable discretion, considering all the circumstances of this case, to repair that defect in as speedy a manner as he could. And, *fourth*, if the defect did not, either in whole or in part, contribute to this loss, it may be disregarded. The injury, as stated by counsel, and very properly, must be one of the perils of navigation; that is, it must have been caused in the navigation of the boat, and flowing from the ordinary perils which come from navigating the river. Included in that is the manner of approaching the landing, as well as moving down the stream.

If you find for the defendant, the form of your verdict will be, simply, "We, the jury, find for the defendant;" if, on the other hand, you find for the plaintiff, the form of your verdict will be, "We, the jury, find for the plaintiff, and assess his damages at" such sum as you name. In reference to the question of damages, if you find for the plaintiff, you will take the value of the boat at the time of the loss. You have heard several witnesses on both sides give to you their opinion as to the value, and the reasons for that opinion, and from that you will determine what the value of the boat was, and award the plaintiff three-sixteenths of that value as your verdict, together with interest from August 10, 1881, at 6 per cent.; that is, you will take three-sixteenths of the value of the boat at the time of the injury, and compute the interest on that at 6 per cent. from August 10, 1881, to the present time, and that, if you find for the plaintiff, will be the amount of his damages; and the form of your verdict will be, "We, the jury, find for the plaintiff, and assess his damages at" that sum.

The jury returned a verdict for the plaintiff.

A motion for a new trial was thereupon made by the defendant, and the following opinion was rendered thereon, viz.:

BREWER, J. In this case, which was tried before me the other day, a verdict was rendered for the plaintiff, and a motion made for a new trial. The question involved is this, whether a stockholder in a corporation has an insurable interest in the property of the corporation. Upon that question counsel for defendant says there are but two authorities prior to this case,—one a case from Ohio,—20 Ohio, 174. An examination of that case shows that the question involved was this: Certain stockholders in a corporation insured their property, and in an application represented that the fee-simple title was in themselves, but it turned out that the fee-simple title was in the corporation, and the decision was that there was a breach of the warranty,—a misrepresentation which avoided the policy. At the close of

the opinion there is a *dictum*, and it is only a *dictum*, that a stockholder in a corporation has no insurable interest in the property of the corporation. The other case is in 31 Iowa, 464. There the supreme court, where the question was distinctly presented, affirmed that a stockholder did have an insurable interest. In the present case, the question was raised before my predecessor, upon demurrer to the petition, and he decided that the stockholder had an insurable interest in the property of the corporation. Whether that concludes me or not, I agree with him: I think that a stockholder in a corporation does have an insurable interest. It is not necessary, in order to create an insurable interest, that the fee-simple title be vested in the insured. It is enough that he has a direct pecuniary interest which may be destroyed, and is entitled to protection.

Now, if the corporation owns but a single piece of tangible property, the destruction of that property by fire or other loss, certainly, destroys the value of his stock, or at least diminishes it. He has an interest in the protection of that property. In this case it appeared that the corporation owned a steam-boat; that was substantially all its assets. Now, the destruction of that property certainly diminishes the value of the stock held by this plaintiff. He had an interest in the preservation of that property, and he had an insurable interest. If the property was the entire property of the corporation, the destruction of the property practically wiped out the value of his stock. So that I think it is fair to say that a stockholder in a corporation has an insurable interest in the personal, tangible property of the corporation. The policy was taken by the defendant upon his interest. The destruction of the property destroyed that interest, and he is entitled to recover.

I do not mean to say that questions may not arise in which the value of the property destroyed may not be the measure of his damages. In the case put by the supreme court of Iowa, supposing the entire property was a grain elevator, which, by reason of its proximity to a railroad, had a large value, a value in excess of the cost of the elevator, they intimate that the destruction of that elevator might cause a loss to the stockholder in excess of his proportionate share of the cost of the property itself; so, on the other hand, if it appeared that a corporation was in debt largely in excess of the value of its corporate property, and that there was no personal liability upon the stockholder,—it might be that the destruction of the property would work no loss to him, because the property would not pay the debts, and he, having no personal liability, would lose nothing, whether the property was destroyed or not. So, in another case, supposing the property was fully insured by the corporation, and the loss was paid to the corporation, it might be that he would have no separate interest as a stockholder protected by insurance, but would only have recourse upon the assets of the corporation, represented by the amount paid by the insurance company to the corporation.

But these questions simply affect the measure of damages; and the general proposition which is affirmed by the decision of my predecessor, and by the decision of the supreme court of Iowa, and in which I concur, is that a stockholder has an insurable interest in the personal, tangible property of the corporation. In this case, from the testimony, I instructed the jury that the measure of damages was the proportionate interest of the stockholder in the corporation in the value of the boat. Under the testimony, I see no reason to doubt the propriety of the instruction, and the motion for a new trial will be overruled.

CASE OF THE CHINESE WIFE.

In re AH MOY, on Habeas Corpus.

(Circuit Court, D. California. September 22, 1884.)

1. CHINESE IMMIGRATION—RIGHT OF WIFE OF CHINESE LABORER TO ENTER.

The wife of a Chinese laborer is not entitled to enter the United States on her husband's certificate since the passage of the act of 1884, but must furnish the certificate required by section 6 of the act. Per FIELD, J.

2. SAME—STATUS OF WIFE—RIGHT TO ENTER UNITED STATES.

Upon the marriage of a Chinese woman, who was not before a laborer, to a Chinese laborer, she takes upon herself the *status* of the husband as one of the class who are not now permitted to enter the United States, without reference to her former *status*. Per SAWYER, J.

On Habeas Corpus.

T. D. Riordan and L. I. Mowry, for petitioner.

S. G. Hilborn and Carroll Cook, for the United States.

Before FIELD, Justice, and SAWYER, HOFFMAN, and SABIN, JJ.

FIELD, Justice. Too Cheong is a Chinese laborer, and resided in the United States, November 17, 1880, and until September, 1883, when he made a visit to China. While there he married a Chinese woman, who, from her appearance in court, must be a mere child. He returned in September of the present year, bringing his wife with him. Before his departure he obtained from the collector of the port the necessary certificate to enable him to return to the United States. It, however, gave him no authority to bring another person with him. The fiction of the law as to the unity of the two spouses does not apply under the restriction act. As a distinct person she must be regarded, and therefore must furnish the certificate required, either by section 4 or by section 6 of the act of 1884.

It is contended by the district attorney that the *status* of the petitioner is that of her husband, and therefore she must be regarded as a laborer, and, as such, required to furnish a laborer's certificate to establish her right to enter the United States. This position

might, in some instances, be tenable; but there are many callings of a man which the wife would not, from her relationship to him, be deemed to follow; such as that of a lawyer or physician, or of a merchant, or manufacturer. We think the case of a wife falls under the sixth section of the act. She is to be regarded as a person other than a laborer, and, as such, required to present the certificate from her government there designated. The language of the section, it is true, is involved and somewhat contradictory, but its meaning plainly is that every Chinese person, other than a laborer, entitled to enter the United States under the treaty, shall obtain from the Chinese government, or the government of which he is a subject, its permission to come within the United States, authenticated by its certificate, containing various particulars of himself and family, so as to clearly identify him; and, while such certificate is only *prima facie* evidence against our government, it is made the only evidence permissible on the part of the person seeking to enter the United States. It is only by this construction of the sixth section that consistency can be given to its somewhat confused language, and the manifest purpose of the act be carried out. It disposes of the application of the petitioner. She cannot land without the certificate there designated. The form prescribed by the section shows that the certificate is to be obtained by women as well as by men.

We are not insensible to the earnest remarks of counsel as to the hardship of separating man and wife. With our notions of the sacredness of that relation, they appeal with striking force. But here the relation was voluntarily assumed in the face of the law forbidding her coming to the United States without the required certificate. And they need not now be separated. He can return with and protect his child-wife in the celestial empire.

Writ discharged, and petitioner remanded.

SAWYER, J. In my judgment, this case presents one of the most important questions that can arise under the Chinese restriction act. It is, whether a Chinese laborer, who was residing in the United States on November 17, 1880, or who subsequently came to the country before August 4, 1882, and who has since returned to China under such conditions as entitle him to re-enter the United States, is entitled to bring into the United States with him, on his return, his wife, who has never before been in the country, and who, therefore, has no other right to enter than that derived from her *status* as wife of a Chinese laborer entitled to enter; that is to say, a right to enter by virtue of a right pertaining to the husband alone, and not as an independent, individual, personal right of her own. If such Chinese laborer has a right to bring into the country with him a wife who has never been here before, he must, upon similar grounds, be entitled to bring with him all his minor children; and, under this right, the number of Chinese laborers who are entitled to come to the United States

will be greatly extended beyond the number who can enter by virtue of their own individual rights. The question is also presented whether the wife of a Chinese laborer, who was not herself a Chinese laborer *in fact* before and down to the time of her marriage, by the act of marriage takes the *status* of the husband, and becomes, in contemplation of law, one of the class intended to be excluded, and as such is excluded, unless she can enter by virtue of the right pertaining to her husband. The construction of the statute upon the points stated is more doubtful, to my mind, than that of any other point raised under the act upon which I have been called to pass. As there is no appeal from the decision of this court, and as the question is one of the greatest importance, both to the Chinese laborers entitled to be in the United States and to the people of this country, the case was also reserved and ordered to be reargued before the circuit justice. Upon the first argument, the conclusion I reached, after considerable reflection, was that the husband is not entitled to bring his wife into the country, she being in fact a Chinese laborer, and never having been here before; and that, upon the marriage of the petitioner in this case with a Chinese laborer, she took upon herself the *status* of the husband as one of the *class* who are not now permitted to enter the United States, without reference to her former *status*. Upon further argument and consideration, the view before taken is confirmed.

Article 2 of the amended treaty provides that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and *Chinese laborers who are now in the United States*, shall be allowed to go and come of their own free will and accord, and *shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations.*"

The argument in favor of petitioner's husband's right to land his wife is that the restriction act purports to be "An act to *execute* certain treaty stipulations relating to Chinese"—*not to abrogate* them; that all the provisions of the act scrupulously avoid everything that *expressly* conflicts with the treaty; that the treaty expressly provides that "all Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations;" that among the "rights and privileges" accorded to citizens of all other nations, are, to come of their own free will and accord, and to bring their wives and children with them; that the treaty, therefore, in clear, express, and unmistakable terms, secures these same rights and privileges to returning Chinese laborers of bringing their wives and children with them, as rights belonging and pertaining to the husband and father; that congress has not excluded their wives and children by name or in express terms; and that it is not to be presumed, from any general language used in the act, that

congress intended to override and abrogate the rights thus specifically and expressly secured by the treaty, thereby to that extent repealing or abrogating the treaty. The policy of the act manifestly is to exclude the entire *class* of Chinese laborers *as a class*. The wife of a Chinese laborer is, it seems to me, one of the class,—that her *status* partakes of and must follow the *status* of the husband as one of his class,—whether she, in fact, labors or not; and, as one of the class, I think the petitioner is excluded by the act, so far as any individual personal right of her own is concerned.

Must the right of the husband to bring his wife with him be regarded as one of the rights accorded to the citizens of the most favored nations, within the meaning of the treaty cited? And, if so, must the language of the restriction act be construed in view of and in subordination to that of the treaty; and, being so construed, can it reasonably be so limited in construction as not to make it conflict with the treaty? The language of the act is very broad. It is provided that "the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for *any Chinese laborer* to come," etc. Section 1. "The master of any vessel who shall knowingly bring within the United States, on such vessel, and land, or *permit to be landed, any Chinese laborer*, from any foreign port or place, shall be guilty," etc. Section 2. "Any Chinese laborer," must mean all and every individual of the entire class. It certainly embraces the wife, who is herself, in fact, a laborer, irrespective of her *status* as the wife of a Chinese laborer. It is impossible not to apply the language to such a laborer, though a wife. And if I am right in the view I have taken, that the wife must be regarded as taking the *status* of the husband as one of the class excluded, then it must be equally applicable to the wife of any Chinese laborer, without regard to her *status* or actual occupation before marriage. So, also, the provision for the certificate to be produced on the return as the only evidence of their right to re-enter the United States, can only be given to those who have been in the country before, and it must be given at the time of their departure. There is no exception in terms, in any of the language used in the act, of the wives or minor children of Chinese laborers, and none can be fairly inferred from any language found in the act. We are not authorized to interpolate the exception into the act. If a Chinese man of the laboring class can bring his wife into the country as a right attaching and pertaining to himself, secured by the treaty, the converse of this rule must be true, and a Chinese woman residing in this country, of the laboring class, or a laborer, in fact, upon loss of her husband, or having no husband, may return to China with her laborer's certificate, marry, and return with her husband, who has never been in the country before. Upon the whole, after careful consideration, I am of the opinion that, even conceding the right to the Chinese laborer entitled to return to bring his

family with him, to be fairly covered by the language of the treaty, yet the provisions of the restriction act are inconsistent and in conflict with the provision of the treaty, so construed, and the statute, being later than the treaty, annuls or repeals it. The result is, the petitioner must be remanded. But if a wife, in the situation of the petitioner, does not take the *status* of her husband, and if the restriction act, as amended in 1884, is applicable to her case, then she has an individual, personal right to enter the United States, as not being a Chinese laborer, without regard to her husband; but, in that case, the certificate prescribed by section 6 is the only evidence upon which she can enter. The certificate she has not got, and the result is the same. I think the former the proper view.

It is greatly to be regretted that every question fairly arising upon the rights of the Chinese under the treaties with China and the restriction acts cannot be taken to the supreme court for an authoritative determination. These questions are of the highest international importance, and ought not to be finally adjudged by the local courts of original jurisdiction. It is earnestly hoped by us that congress will provide for writs of error or appeals in this class of cases.

CASE OF THE LIMITED TAG.

In re Kew Ock, on Habeas Corpus

(Circuit Court, D. California. September 22, 1884.)

CHINESE IMMIGRATION — CUSTOM-HOUSE "TAG" — CERTIFICATE — CHINESE LABORER.

The only evidence of the right of a Chinese laborer who left the United States after the passage of the act of 1882 to re-enter this country is the certificate provided in the act; and the fact that he had a "tag" entitling him to such a certificate, but that the collector took up such "tag" and failed to give him a certificate therefor, will not entitle him to re-enter.

On Habeas Corpus.

T. D. Riordan and L. I. Mowry, for petitioner.

S. G. Hilborn and Carroll Cook, for the United States.

Before FIELD, Justice, and SAWYER, HOFFMAN, and SABIN, JJ.

FIELD, Justice. The petitioner in this case is also a Chinese laborer, who was a resident of the United States on the seventeenth of November, 1880, and until the twenty-first of June, 1883, when he departed for China. Previous to his departure he applied to the collector of the port of San Francisco for a certificate under the restriction act, to enable him to return to the United States, stating that he wished to leave on the City of Tokio. After the usual examination and registry, he received from the collector the white tag generally

given in such cases, entitling him to a certificate stating that he was to leave on the steamer named, which sailed the thirty-first of May, 1883. Subsequently, but prior to the leaving of the steamer, he concluded to delay his departure until the next steamer, which left on the fifteenth of June. On that day he went on board this last steamer, and demanded of the collector present a certificate in exchange for his tag. The collector refused the certificate, as the tag called for one stating that he was to leave on the City of Tokio, and not on the one then about to depart. He also took from the petitioner the tag given to him. The petitioner accordingly left on the steamer City of New York without any certificate, and now claims a right to re-enter the United States by virtue of his old tag, and the certificate to which that entitled him, and invokes the order of the court for his relief.

The court cannot help the petitioner. As the tag received only called for a certificate stating that he was to leave on the steamer City of Tokio, he could not, by virtue of it, claim a certificate stating that he was to leave by another steamer. He should have returned the tag to the collector, and asked for one giving him a right to a new certificate, stating his intention to leave by a different steamer. Not having done so, and having left without any certificate, he is in the same position he would have been had he departed without any attempt to obtain one.

The law of 1884 makes the certificate to the Chinese laborer "*the only evidence permissible to establish his right of re-entry*," and the court cannot, therefore, listen to any tale of his supposed grievances. As stated in the *Case of the Unused Tag*, ante, 701, the remedy, if he have any, must come from the officers in Washington who have control over the collector. The court has no jurisdiction to supervise his action towards the petitioner, and direct the specific performance of any neglected duty to him.

Writ discharged, and petitioner remanded.

SAWYER, J. In this case, in my judgment, the rights of the petitioner must be determined by the restriction act of 1882, which was in force at the time of his departure. But whether governed by the original act, or the act as amended in 1884, the result is the same; for, under either, the certificate provided for in the act is the only evidence permissible to establish his right of re-entry, and he had neither certificate. There is no dispensing power conferred upon the courts. See my views on this point expressed in the *Case of Ah Kee*, ante, 701, just decided, and also the views of Mr. Justice FIELD upon the point in the same case.

I concur in the order remanding him.

CASE OF FORMER RESIDENCE BY A CHINESE LABORER.

In re CHEEN HEONG, on Habeas Corpus.

(Circuit Court, D. California. September 29, 1884.)

CHINESE IMMIGRATION—ACTS OF 1882 AND 1884—CHINESE LABORERS—CERTIFICATE—FORMER RESIDENCE IN UNITED STATES.

A Chinese laborer resided in the United States from November 17, 1880, until June, 1881, when he departed for Honolulu, in the Hawaiian kingdom, where he remained until September, 1884, when he sought to re-enter the United States. *Held*, that the acts of 1882 and 1884 did not except him from the necessity of presenting the certificate required by those acts, and that without it he could not be allowed to re-enter.

SAWYER, SABIN, and HOFFMAN, JJ., dissenting.

On Habeas Corpus.

T. D. Riordan and L. I. Mowry, for petitioner.

S. G. Hilborn and Carroll Cook, for the United States.

Before FIELD, Justice, SAWYER, SABIN, and HOFFMAN, JJ.

FIELD, Justice. The facts of this case differ from those in the *Case of the Chinese Laborer with an Unused Tag*, ante, 701, recently decided, in this particular: that the laborer there left the United States, after the passage of the act of 1882, without a certificate enabling him to return, relying upon a tag entitling him to such a certificate, but which he had not obtained, while the laborer here left before the passage of the restriction act, and of course before any certificate was required. It appears, from the agreed statement of facts, that the petitioner is a laborer of the Chinese race, and a subject of the emperor of China; that he resided within the United States on the seventeenth of November, 1880, and continued his residence until June, 1881, when he departed for Honolulu, in the Hawaiian Kingdom, where he remained until September of the present year, (1884,) and then returned to the port of San Francisco, and, of course, without any certificate under the act of 1882, or that of 1884, as none could be issued to him while out of the country; and he now seeks to land by virtue of his residence here on the seventeenth of November, 1880, contending that the acts of 1882 and 1884 except Chinese laborers in like situation from the necessity of presenting any certificate, inasmuch as it would be impossible to obtain one.

My associate, the circuit judge, sustains the contention of the petitioner, and in a written opinion has presented his construction of the act with his usual elaboration and learning. The district judge of this district and the district judge of the district of Nevada concur with him. It is, therefore, with much diffidence that I venture to express my dissent from their conclusions. The restriction act of 1882 in its first section declares that, after 90 days from its passage, and for the period of 10 years from its date, the coming

of Chinese laborers to the United States is suspended, and that it shall be unlawful for any such laborer to come, or, having come after the 90 days, to remain within the United States. The second section makes it a misdemeanor punishable by fine, to which imprisonment may be added, for the master of any vessel knowingly to bring within the United States from a foreign port and land any such Chinese laborer. The third section then provides that the two sections mentioned shall not apply to Chinese laborers who were in the United States on the seventeenth of November, 1880, or who came within 90 days after the passage of the act, "*who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned;*" nor shall they apply to the case of a master of a vessel coming within the jurisdiction of the United States by reason of stress of weather, or touching at any port of the United States on its voyage to a foreign port,—the laborers brought to depart with the vessel.

What, then, is the evidence which must thus be produced to the master in the foreign port, and to the collector at the port of the United States, by the laborers thus within the exception mentioned? The fourth section answers this. It declares that, for the purpose of identifying those laborers,—that is, those who were here on the seventeenth of November, 1880, or came within the 90 days mentioned,—and to furnish them with "the proper evidence" of their right to go from and come to the United States, the "collector of customs of the district from which any such Chinese laborer shall depart from the United States, shall, in person or by deputy, go on board such vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, to be entered in registry books to be kept for that purpose, with a statement of the age, occupation, last place of residence, and of physical marks or peculiarities of each one necessary to his identification; and each laborer thus departing shall be entitled from the collector, or his deputy, to a certificate containing such particulars corresponding with the registry as may serve to identify him. "The certificate herein provided for," says the section, "shall entitle the Chinese laborer, to whom the same is issued, to return and to re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter."

Now, what is the meaning of these provisions? It is not, as I read them, that the Chinese laborer in the United States on the seventeenth of November, 1880,—the date of the supplementary treaty,—or who came within 90 days after the passage of the act,—that is, before it took effect,—shall be subsequently permitted—that is, after the act had taken effect—to come without any certificate, for the act

makes no exceptions of persons by whom it must be obtained. It means, in my judgment, that those laborers, *if still in the United States when the act takes effect*, and desirous to leave and yet return again, shall be permitted to do so upon obtaining the prescribed certificate. The production of that certificate is the only protection of the master of the vessel against criminal prosecution for bringing and landing those laborers after the expiration of 90 days from the passage of the act; it is the only evidence which the act requires to be furnished by them, and its production is the essential condition prescribed for their landing. The act, interpreted according to its direct language, necessarily excludes in its operation those who left the country before the act took effect. If this construction works any hardship, it is for congress to change the act. The court has no dispensing power over its provisions. Its duty is to construe and declare the law, not to evade or make it. Oftentimes, indeed, there is a sense of impatience in the public mind with judicial officers for not announcing the law to be what the community at the time wishes it should be. And nowhere has this feeling been more manifested than in California, and on no subject with more intensity than that which touches the immigration of Chinese laborers; but it often does great injustice to officers anxious to perform their whole duty. While I differ from my associates in the construction of the restriction act, I can bear testimony to the great solicitude manifested by them to reach a right conclusion. If, as already stated, the law works any hardship, it is for congress to change it. With that body it rests, under the constitution, to determine what foreigners shall be permitted to come to the United States and on what conditions to remain.

The provisions of the amendatory act of 1884 seem to me to remove any doubt as to the necessity of the certificate, if any existed under the act of 1882, for the admission of any Chinese laborers, who may have left the country before the passage of the original act. Under the construction adopted in this circuit, parol evidence had been allowed in a multitude of cases where previous residence was alleged; and the district and circuit courts were blocked up by them, to the great delay of their general business and the inconvenience of suitors. This circumstance, and the suspicious character, in many instances, of the testimony produced, from the loose notions entertained by the witnesses as to the obligation of an oath, created a general expression of a desire for further legislation placing some restriction upon the evidence which should be received. This desire led to the passage of the amendatory act; and by that it is declared that the certificate which the laborer must obtain "shall be the *only evidence permissible* to establish his right of re-entry" into the United States. This declaration applies to the certificate issued under either act. By it the door is effectually closed to all parol evidence. Nothing can take the place of the certificate or dispense with

it. As was said in the *Case of the Unused Tag*, "if the collector refuses to the Chinese laborer any rights to which, under the restriction act, he is entitled, he should apply to the superior of the collector at Washington, the head of the treasury department, for proper instructions to him. The court has no supervising jurisdiction over the manner in which he discharges his duty."

Writ discharged, and petitioner remanded.

SAWYER, J., *dissenting*.¹ The petitioner, a Chinese laborer, who was residing in the United States on the seventeenth day of November, 1880, left San Francisco for Honolulu, in the Hawaiian Islands, on June 18, 1881, before the passage of the Chinese restriction act of May 6, 1882, and, consequently, without the certificate prescribed by section 4 of that act. He remained at Honolulu till September 15, 1884, when he embarked for San Francisco, in the state of California, at which port he arrived September 22, 1884. He now claims the right to re-enter the United States, and to land from the steamship on which he came, upon other satisfactory evidence of his former residence and departure, without producing the certificate prescribed by section 4 of the act, either as it originally stood or as amended by the act of July 5, 1884. The question is whether, under the restriction act and the treaty with China, he is entitled to land, upon other satisfactory proof of his former residence, without producing the certificate prescribed,—no such certificate being required at the time he left the United States, and it not being possible, under the acts of congress since passed, to obtain one. In other words, are the provisions of section 4 of said Chinese restriction act, as amended on July 5, 1884, *applicable* to Chinese laborers who resided in the United States on November 17, 1880, who afterwards departed from the United States before the passage of said act of May 6, 1882, and who did not return till September 22, 1884, after the passage of the amendatory act of July 5, 1884? or are the provisions of said section 4 only applicable to such Chinese laborers as departed *after* its passage, and who had an opportunity to procure the certificate required by it?

I have no doubt that the act and the amendatory act took effect as laws of the United States from the date of their passage, and, no doubt, that the certificate prescribed by section 4 is the only evidence of a right to re-enter the country, as to all Chinese laborers *to whom it is applicable*, or who are within the purview of its provisions. On these points I have no doubt; but construing the act upon a consideration of all its provisions, and in view of and in subordination to the provisions of the treaty, it is very clear to my mind that congress did not intend to make the provisions of section 4 applicable, and that they do not apply, to those Chinese laborers who were in the

¹ HOFFMAN and SABIN, JJ., who sat as consulting judges, concurred in the dissenting opinion of the circuit judge.

country on November 17, 1880, and who subsequently left the United States before the passage of the original act, and who could not possibly have obtained the prescribed certificate, and as to whom the collector could not perform the prescribed conditions imposed upon him. The act purports to be an act "to execute certain treaty stipulations with China,"—*not to abrogate them.*

It is scrupulously framed so as not, in express terms, to conflict with the provisions of the treaty. If it be held to take away any rights secured by the treaty, it must be done by construction, and by far-fetched and overstrained implications,—not because of any direct, express provision to that effect. The treaty and the act must, if possible, be so construed that they can stand together. The treaty with China authorized the government of the United States to "regulate, limit, or suspend" the coming of "Chinese laborers" to, or residence in, the United States. But it provided that "the limitation or suspension *shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitation.*" And it was further expressly provided that "legislation taken in regard to *Chinese laborers will be of such character only as is necessary to enforce the regulation, limitation, or suspension of immigration.*" It is still further provided that "*Chinese laborers who are now in the United States (at the date of the treaty, November 17, 1880) shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.*" The restriction act must be construed with reference to the provisions of the treaty. Section 1 of the act, as amended in 1884, suspends the coming of Chinese laborers for 10 years, and provides that during said suspension "it shall not be lawful for any Chinese laborer to come from any foreign port or place, or, having so come, to remain in the United States." Section 2 makes it an offense for the master of any vessel to land, attempt to land, or permit to be landed, any Chinese laborer from any foreign port or place. But section 3 provides that "the two foregoing sections *shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of the act, * * * nor shall said section apply to Chinese laborers who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States, at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in the section mentioned.*" Two classes are here plainly indicated, to which the prohibitory provisions "shall not apply;" or rather one whole class, and a subdivision of the class. The first is general, embracing all "Chinese laborers" "who were in the United States on the seventeenth day of November, 1880;" and, secondly, "*nor shall said sections apply to Chinese*

laborers who shall produce * * * the evidence hereinafter in this act required of his being one of the laborers in this section mentioned." They shall neither apply to the one class; containing all, "*nor*" to the sub-class, who shall procure and produce the prescribed certificate. Who constitute the sub-class referred to, who are required to produce the evidence hereinafter required? Plainly, those who depart *after* the passage of the act, and who procure, or who can procure, under the law, the certificate required in section 4, which can only be obtained by those subsequently departing. In the original act the language was, "shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, * * * and who shall produce" the evidence prescribed. The significant change was made by dropping the "and," and adopting in its place, "*nor* shall said sections apply to Chinese laborers who produce," etc. This is, clearly, distinguishing between the two classes, or the two divisions of the one class,—those laborers to whom the preceding sections *do not apply, who had already departed*; and those who should *thereafter depart*, and who, upon departing, must procure the certificate provided for in section 4. Before the amendment there was some little plausibility in claiming that none were exempt from securing the certificate, but there appears to me to be none since the amendment. Under the act as it originally stood, we held in *Leong Yick Dew*, 19 FED. REP. 490, that the provisions of section 4, relating to the certificate, did not apply to those who had departed before the passage of the act, and who could not possibly procure the certificate; and with that decision I am still entirely satisfied. *A fortiori*, under the act as amended these provisions are inapplicable.

But the provisions of section 4, *ex vi termini*, apply, and they can only apply, to those Chinese laborers who depart after the passage of the amendatory act; they cannot possibly be applied to those who have already departed. They relate to and provide for *future action* in obtaining and producing certificates; they have no relation to the past. Some entitled to return have already gone, and some may go hereafter; and it is provided that the latter shall procure the certificates, the provision necessarily having reference to the latter. It is provided, in section 4, "that for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, 1880, * * * and in order to furnish them with the proper evidence of their right to go from and come to the United States, as *provided in said act and treaty*, * * * the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall * * * go on board each vessel *having on board* any such Chinese laborer, and cleared or *about to sail* from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered on registry books, * * * in which shall be stated the names, description,

physical marks, etc., and every Chinese laborer *so departing* from the United States *shall be entitled to and shall receive*, * * * from the collector, * * * at the time such list is taken, a certificate.' * * * The certificate *herein provided for* shall entitle the Chinese laborer *to whom the same is issued* to return and re-enter the United States upon producing and delivering the same to the collector of customs, * * * and *said certificate* shall be the only evidence permissible to establish *his* right of re-entry." *Ex vi termini*, all those provisions apply, and can only apply, to those of the class who depart after the passage of the act. The future tense is used throughout the section, and the acts to be performed can only be performed in the future; and "*said certificate*," which shall be the only evidence permissible to establish a right of re-entry, is the certificate provided for in the first part of the same section, to be issued to *future* departing laborers. And those who receive it, and *only* those who can receive it, are the ones to produce it, as the only permissible evidence of their right to return. *No certificate is provided for those already gone before the passage of the act*, and there is no requirement that they shall produce one. *Nothing is said as to what the evidence of a right to re-enter shall be for those not provided for in this section*. No practical form of evidence other than that recognized by the ordinary law of evidence could be provided for them, and none was attempted to be provided. *As to those who had a right to return,—under the provisions of the treaty, and under the express provisions of the first clause of section 3 of this amended act, in language similar to that of the treaty, in regard to whom no specific evidence is provided,—the ordinary rules of evidence as to competency must apply, for no others are prescribed*. That congress could not have intended to require the collector to go on board vessels *already departed*, and before their departure issue certificates to Chinese laborers who were already gone and safely landed in China, must be manifest.

In *Leong Yick Dew*, 19 FED. REP. 493-496, *three judges sitting and concurring* in the decision, we said:

"Congress could not possibly have intended to require that class of Chinese laborers to procure the required certificate where it was a physical impossibility for them to obtain it; and it is impossible for me to believe, under the circumstances, that congress intended to arbitrarily exclude that class in direct violation of the express terms of the treaty protecting them. Congress had declined to enact any such legislation as is contained in the restriction act while the Burlingame treaty was in force, for the reason that it would be an act of bad faith on the part of the United States towards China, and a direct violation of the solemn stipulations of the treaty between the two governments. The United States went to the trouble and expense, and incurred the delay, of sending a special mission, composed of three distinguished gentlemen, to China, for the express purpose of procuring a modification of the Burlingame treaty, in order to enable the United States to adopt the legislation now in question, without committing an act of bad faith towards China, and without violating the treaty stipulations between the two nations. A treaty was made with the modification sought by us, which was ratified by, and apparently satisfactory to, both nations. And the modified treaty, in

express and the most explicit terms, protected the class in question in their right to remain in the United States, or 'to go and come of their own free will and accord,' and also provided that they 'shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations.'

"It is expressly stipulated in the supplementary treaty 'that the legislation in regard to Chinese laborers will be of such character *only as is necessary* to enforce the regulation, limitation or suspension of emigration,' and that 'the limitation, or suspension shall be reasonable.' Conceding the legislation requiring Chinese laborers departing from the United States after the passage of the act in question, and having an opportunity to do so, to procure and produce the required certificate to be 'necessary' and 'reasonable,' still such a requirement, as to those who departed after the date of the treaty, and before the passage of the act, or before it was practicable or possible to obtain the certificate, could neither be necessary nor reasonable. If congress then intended by this act to make this provision, requiring the prescribed certificates, applicable to those Chinese laborers who were in the United States at the date of the treaty, and who left before the passage of the act of May 6, 1882,—before it was possible to obtain the certificate,—or intended to altogether exclude those already departed, then it was the deliberate intention of congress to act in bad faith towards the government of China, and to violate the solemn obligations of the very treaty it had taken so much pains to obtain, in order to enable it to honorably legislate at all upon the subject. Why take all this trouble to negotiate a treaty, if it was intended, at last, to flatly disregard it, and legislate in direct violation of its most solemn and vital stipulations? Congress might, with just as much propriety, have ignored and disregarded the Burlingame as the supplemental treaty. There would be just as much propriety in wholly repudiating the treaty, as to repudiate it in this vital part, which the Chinese government took care to have inserted. It would be to the last degree absurd, under the circumstances, to suppose for a moment that congress intended to make the provisions of sections 3 and 4, relating to certificates, applicable to the class of Chinese laborers referred to. We cannot attribute to congress a deliberate intention to commit any such act of bad faith, without provisions manifesting such a purpose, far more explicit than any found in the act. It would be disrespectful to that body, if not absolutely indecent, to attribute to it such an act of bad faith.

"Again, the same section which requires the certificate gives to the departing Chinese laborer an absolute, indefeasible right, without cost or expense, to have the certificate, in order that he may be able to produce it as evidence of his right to re-enter the United States. The necessity to produce it, and the right to have it, in order that he may produce it, are correlative conditions. The one provision is the complement of the other: they are reciprocal and must go together. The obligation to produce the certificate presupposes the practicability, or at least the possibility, of procuring it in order that it may be produced. The two provisions go together and form but one legal conception. The obligation to produce, and the right and ability to obtain it, are *dependent*, and *not independent*, conditions. One is the counterpart of the other, and it is not to be supposed that congress would have adopted one branch of the proposition without the other, otherwise it would have distinctly done so in terms. If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or, if intended, it must be void. The law requires nothing impossible,—*lex non cogit impossibilia*; Bouv. Law Dict. 'Maxims'; Broom, Max. 242; and *lex non intendit aliquid impossibile*, (Bouv. Law Dict.,)—the law intends not anything impossible,—are among the most venerable maxims of the law. In a statute, 'no text imposing obligations

is understood to demand impossible things.' Sedg. St. Law, 191. 'Provisions in acts of parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with or contrary to the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act.' Dwar. St. 582. The rule is to construe the words 'in their ordinary sense, unless it would lead to *obscurity or manifest injustice*, and if it should so vary them as to avoid that which certainly could not have been the intention of the legislature, we must put a reasonable construction upon the words.' Id. 587. See *Donaldson v. Wood*, 22 Wend. 399; *Lake Shore Ry. Co. v. Roach*, 80 N. Y. 339.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice, oppression, or an absurd consequence*. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over the letter.' *U. S. v. Kirby*, 7 Wall. 486. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum.' *Henderson v. Mayor of New York*, 92 U. S. 268. See, also, *Brewer v. Blougher*, 14 Pet. 198; *U. S. v. Freeman*, 3 How. 564. So in the case of the class of Chinese laborers now under consideration. To require them to produce a certificate as the *only* evidence of their right to land, when it was impossible or impracticable to procure it, would be, in effect, to absolutely and unconditionally exclude them. Yet it is manifestly the policy, intent, and reason of the law to carry out in good faith the stipulations of the treaty, that they 'shall be allowed to go and come of their own free will and accord;' and 'be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.' We are, therefore, fully satisfied that those Chinese laborers who were in the United States on November 17, 1880, and left before the passage of the restriction act, and those, also, who came into the United States and departed therefrom between that date and May 6, 1882, are entitled to re-enter the United States upon satisfactory evidence other than the certificates provided for in said section 4."

The foregoing was said with reference to the act of 1882 before its amendment, but it applies with even greater force to the act as amended in 1884.

In *Ah Quan's Case*, arising under this act, as amended in 1884, after a further discussion of this point, as applicable to the act as amended, we stated our conclusion as follows, (21 FED. REP. 184:)

"To hold that congress intended to require the performance of the dependent obligation, on the part of the Chinese laborer, until the government has discharged its correlative and precedent duty and obligation, upon which his obligation rests, imposed by the act, by furnishing the certificate, and thereby rendering it possible for him to produce it, would be to attribute to congress a deliberate intent to enact a palpable and glaring absurdity, thereby violating one of the most venerable canons of statutory construction, that a statute must not be so construed as to lead to an absurd conclusion. We must conclude, therefore, in the absence of any express declaration to that effect, and of any reference whatever to those who had already departed, with a right, at the time of their departure, secured by express terms of the treaty, to return, that it was not intended to require the production of the certificate by those

who departed from the country before it was possible to obtain it. And, in the absence of any provision so declaring, that congress did not, in fact, intend to exclude such Chinese laborers as were in the country at the time mentioned, is clearly manifest, because it has said so in express terms in the provision of section 3, 'that the two foregoing sections [excluding Chinese laborers] shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880,' etc. It is clear, from the necessities of the case, that this section is only applicable to those who departed after the passage of the act, and who had the opportunity to procure the certificate. To hold otherwise would be to render this clause, making the impossible certificate the only evidence as to those who had departed before the passage of the act, absolutely inconsistent with the clause of section 3 referred to, that the preceding sections 'shall not apply to Chinese laborers who were in the United States' at the designated period, and render that provision wholly nugatory, as well as to violate the treaty which the act proposes to execute and not to abrogate. The different provisions of the statute must be so construed, if possible, that they can stand together, and not so as to nullify each other. The clause of the amendment making the certificate the only evidence, as to those to whom it is applicable, of a right to re-enter the United States, only declares in express and explicit terms what we held the original act to mean, and in no way changes its effect in this particular as we had construed it.

"Our construction of the original act in *Leong Yick Dew*, 19 FED. REP. 491, was before congress at the time of the passage of the amendatory act. If it had been intended to make the amendment as to the prescribed certificate being the only evidence of a right to return applicable to those Chinese laborers who were in the country at the date of the treaty, and who departed after that date, and before it was possible to obtain the certificate required, as to whom *we had before distinctly held it to be* inapplicable, congress would certainly have amended the first clause of section 3 so as to read in substance as follows: 'The two preceding sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, etc., *except as to those who departed from the United States after said seventeenth day of November, 1880, and before the passage of the act, or before it was possible to obtain such certificate.*' This is, in effect, the way those who insist upon the production of such certificate by that class as the only evidence of their right to re-enter the United States must read it, in order to sustain their view, or the view that it was intended absolutely to exclude that class in violation of the treaty stipulations. Congress has not introduced any such exception, and we are not authorized to interpolate it into the act. To do so would be to legislate, not to construe. The action of congress in not introducing any exception of the kind indicated, but, on the contrary, so amending the act as to make the propriety of our construction more clearly manifest, in view of our well-known previous construction of the original act on this very point, is, in effect, an emphatic approval of that construction."

See, also, the case of *Shong Toon*, 21 FED. REP. 386, where this question is well discussed by HOFFMAN, district judge.

Another shade of the opposing views maintained by the United States attorney, but essentially the same, has been suggested, which necessarily assumes that section 4 does not apply to those who departed prior to the passage of the act of 1882. It is that congress did not intend that any of these Chinese laborers who were in the country on November 17, 1880, who had departed before the passage of the act of 1882, or, in other words, who were not still in the country at that date, should return at all, and consequently that there was

no need of requiring as to them the certificate prescribed by section 4 or any other. There is not one word in the act that directly declares or hints at such a purpose, and not one section, clause, or word from which an inference of such intent necessarily or naturally arises; nor does it necessarily or naturally arise upon the whole act taken together. On the contrary, the opposite intent, as we have seen, is expressed in precise and unmistakable language, that cannot be misunderstood, in that clause of section 3, which provides "that the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall come into the same before ninety days next after the passage of the act to which this is amendatory." This language embraces every individual member of the class to which it refers, no matter whether he was in the country at the time of the passage of the act or not, and its force and effect cannot be limited except upon some vague, imaginary inference of a purpose not justified by anything found elsewhere in the act. The only supposed ground for the inference suggested, not already noticed, arises out of sections 5 and 12.

Section 5 provides "that any Chinese laborer mentioned in section 4 of this act, *being in the United States*, and desiring to depart from the United States *by land*," shall be entitled to demand and receive a certificate similar to those given to those departing by water, etc. The limitation is expressly restricted to the class provided for in section 4; that is, those, necessarily, who depart after the passage of the act. It is suggested that this clause, "*being in the United States*," indicates that it was only intended that those allowed to return are only such of those who were in the United States on November 17, 1880, as were still remaining in the United States at the date of the passage of the act, and that the first clause of section 3 should read: "That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, *and who are still in the United States at the date of passage of this act*." I do not draw any such inference from that clause of section 5, either taken alone or in connection with any other provisions of the act. Congress has not inserted in section 3 any such clause as "*who are still in the United States at the date of the passage of this act*," or any equivalent language. To insert such language would be to change the entire scope of the provision. As congress has not seen fit to insert words so largely limiting the number embraced in the language of section 3 *as actually used*, we certainly are not authorized to legislate and insert it. The inference I draw, on the contrary, is that in this section it appears by the express terms of the provision that it was only intended to require those who were in the country at the date of the passage of the act, and who could comply with the act, to procure the certificates and produce them on their return; or, in other words, it expressly sanctions what I have endeavored to main-

tain the true construction of section 4 to be; that its provisions were only intended to be applicable to those who still remained in the country at the date of the passage of the act, and *no provision at all is made as to what evidence those who departed before the passage of the act shall produce, and they are left to the usual evidence recognized as competent by the general laws of the land.* This clause, as I think, confirms instead of opposes the view which I have adopted and endeavored to maintain. Neither the provisions of section 4 nor 5 apply to those who departed before the passage of the act, but are limited to those who were in the country at the date of its passage, and were, in fact, able to comply with its terms, and no other view can be sustained without incorporating into sections 3 and 4 language not used or authorized by congress,—without further amending the act.

From the fact that section 4 prescribed a certain certificate to be procured and produced on return by those Chinese laborers who were in the country at the date of the treaty and departed after the passage of the act, and who could procure and produce it; and from the fact that *such* parties are required to procure and produce said certificate—the certificate issued to that class of Chinese laborers—as the only permissible evidence of *their* right to return; and from the further fact that *nothing* is said as to what kind of evidence shall be produced by all those Chinese laborers who were residing in the country on November 17, 1880, and who left before May 6, 1882, and who, under the treaty, and under the express provision of the first clause of section 3 of the act itself, are entitled to return,—it is sought to draw the inference that congress intended that those very Chinese laborers mentioned in the treaty, and the first clause of said section 3, as being entitled to return, who had departed before May 6, 1882, should not be permitted to return at all. I do not, myself, perceive how such an inference or conclusion can be drawn from such premises. There is nothing in the least respect inconsistent in the two ideas: (1) That those who had departed before the passage of the act of 1882, to whom it would be impracticable to apply any other rule as to the competency of evidence, or to require any other kinds of evidence than those recognized by the general law of the land, should not be required to produce any other kind of evidence; and (2) the idea that those who departed after the passage of the act, and who could procure the more certain prescribed certificate, should be required to procure and produce such certificate. The conditions of the two classes are radically different, and different conditions require, or at least admit of, different treatment and different rules. The rules applicable to these two conditions in no way interfere with each other. They can stand, and, consistently, operate together; and the fact that congress has prescribed a certain certificate for parties entitled to re-enter the country, to whom they are, practically, applicable, under certain conditions in which they are found, affords no inference that congress, by so providing for such conditions and such

parties, and saying nothing about another class, surrounded by different conditions, equally entitled to re-enter under the express provisions of the same act and treaty, to which class a requirement to produce a similar certificate cannot possibly be made practically applicable, were intended by congress to be excluded altogether. Especially is no such inference afforded where the general rules of evidence applicable are practicable and effective as to such latter class. I am not aware that any statutory provision was ever held to be repealed, abrogated, nullified, or in any way rendered ineffectual by some other provision in the same act, saying nothing at all about it, in no way inconsistent with it, and practically or possibly applicable, only, to other parties and other conditions. I am not aware of any rule of statutory construction, justifying such an inference, not naturally arising out of the conditions, or such an implied abrogation of another *express* provision of an act. Section 3 expressly provides that "the two foregoing sections shall *not apply* to Chinese laborers who were in the United States on the seventeenth day of November, 1880. * * * Nor shall said sections apply to Chinese laborers who shall produce" the certificate provided by section 4, for those to whom its provisions can be made applicable shall apply neither to one "*nor*" the other. What is the purpose or use of the first branch of this provision, if, because, congress provided no kind of evidence other than that recognized by general provisions of law, and said nothing about the evidence as to them, it is to be inferred from the provisions for certain evidence for the *second* class that it was intended that all of the first class who departed before the passage of the act, and who were, therefore, not included in the second class, were to be altogether excluded, and those of the second class were, after all, the only ones intended to be permitted to re-enter the United States at all? Some effect must, certainly, be given to the first as well as to the second class of section 3. It is as clear and specific as the second, and cannot be misunderstood. It must stand, or be overruled and abrogated by an inference not necessarily or even naturally arising out of the conditions. But none can be given it, if it is to be inferred, from the provision of a specific class of evidence for the second class, that the first are to be altogether excluded. I confidently maintain that no such inference can be justified by any established rule of statutory construction, or without ignoring and utterly disregarding the unmistakable meaning of language,—without amending instead of construing it. *It is the first time in my experience that an express, clear, and explicit provision of a statute has been claimed to have been annulled by a subsequent provision relating to another class of subjects, in no way referring to the clause claimed to be abrogated, and not in the slightest degree inconsistent with it.*

Some support to the inference sought to be drawn from section 5 is also attempted to be drawn from the first clause of section 12, providing "that no Chinese person shall be permitted to enter the

United States *by land* without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel." This is only the complement or counterpart of section 5 out of place. Although broad in its terms, it is evidently intended to refer only to the certificate provided for in section 5 to be issued to those departing by land after the passage of the act, like the provisions of section 4, applicable to those provided for in that section. The two provisions of sections 5 and 12 must be read together. It would seem to have been forgotten in draughting section 5, and afterwards inserted out of place with other provisions not properly germane to it. Besides, by its express terms, it only applies to passengers who enter "*by land*," and cannot be extended beyond its terms. It can do little to support an inference that has no other basis whatever upon which to rest, and it certainly does not authorize us to interpolate a clause into section 3 greatly limiting its scope, and which congress itself did not enact.

The question directly presented in this case is whether a Chinese laborer who was in the United States at the date of the treaty, but departed therefrom before the passage of any law requiring him to procure a return certificate, must now, under the provisions of section 4 of the amended act of 1884, be denied the right to land, for failure to procure the certificate required by that section, or whether he can be permitted to land at all. But the construction of the amended act contended for by the United States attorney, and which seems to be adopted by the circuit justice, will not merely affect the rights of those alone who departed from the United States prior to the passage of the act of May 6, 1882. The language of the fourth section of the act is deemed, by the circuit justice, so peremptory that it absolutely prohibits the landing of all laborers who shall fail to produce the certificate *therein required*, although such prohibition may be in clear violation of rights solemnly guarantied by the treaty of November 17, 1880. But, if such be the true construction to be given to the section in question, it will exclude from the United States those Chinese laborers who have departed after obtaining the certificate required by the act of 1882, for they, like those who departed before the passage of any law on the subject, will be unable to produce the certificate required by the amendatory act of 1884. The custom-house authorities have hitherto, and since the passage of the act of 1884, allowed Chinese passengers to land who produced certificates issued in conformity with the provisions of the act of 1882, on the ground that the faith of the nation was pledged to allow the return of those Chinese laborers who left the United States while the act of 1882 was in force, and who complied with its requirements.

But if the ruling of the presiding justice is to prevail, the certificate issued under the act of 1882 will, in my judgment, upon that construction, no longer be available, and all those Chinese who departed from the country during the two years or more from June 6, 1882, to

July 5, 1884, relying upon the certificates issued by the collectors authorizing their return, who have not already returned, must be excluded. It may be said that these certificates are similar in substance to those required by the act of 1884. This is, to a certain extent, true. But they are *not identical*. They differ in some *essential* particulars. The latter certificates, unlike those provided for by the act of 1882, are required to contain the statement of "the individual family and tribal name" (of the laborer) in full, and "*his occupation when and where followed.*" The certificate is to be "issued in the name of the collector, and attested by his seal of office, * * * and said certificate shall be the only evidence permissible to establish his (the laborer's) right of re-entry." It will be seen that this certificate differs essentially from that provided for by the act of 1882, embracing other particulars not required under the original act; and, if the last clause I have quoted is to be held to be applicable to *all* returning laborers who left the United States before the passage of any law on the subject of certificates, it must also be held to apply to all laborers who fail to produce the "*said certificate*" in that section described and required. I know not by what authority we can hold the law applicable to all returning laborers, and at the same time admit laborers who produce, not the certificate required by the existing law, but a certificate containing less, and which is essentially different, issued in conformity with a repealed and superseded law. If congress is to be deemed to have violated or disregarded the stipulations of the treaty with China, it must also be deemed to have violated the implied pledge given in the law of 1882, that those who should leave the United States after fully complying with its provisions should be allowed to return. Those who received the certificates issued during a period of two years, under the act of 1882, and departed upon the faith of the law and the treaty, who have not yet returned, are no more excepted under the law, as amended in 1884, than are those who departed between the dates November 17, 1880, and May 6, 1882, relying on the assurances of a right to return contained in the then existing treaty and laws; and they must also be excluded. If congress is capable of such acts of bad faith as are shown in the passage of the original and amendatory acts, upon the construction given them by the presiding justice, then it must be capable of repeating these acts of bad faith at each recurring session, and thereby annually cutting off a considerable portion of those who left with a right to return guarantied to them by both the treaty and the law in force, and there is nothing in the treaty, the law, or the good faith and honor of the nation, upon which these people can rest in security. If it had been the intention to violate the specific terms of the treaty which secured the right to those Chinese laborers who were in the United States at the date of the treaty "to go and come of their own free will and accord," by excluding from returning all those who departed for temporary purposes upon the faith of the treaty prior to the passage of the act of

1882, congress would certainly have acted in a manly way, and expressed that intention boldly, openly, and by plain and direct language which could not be misunderstood.

In the language of the district judge in *Shong Toon's Case*, *supra*: "Can it be contended that any court should so construe this act—if such construction could by possibility be avoided—as to impute to congress, when legislating 'to execute certain treaty stipulations with China,' and while affecting to acknowledge rights secured by the plain language of the treaty, the intention to attach, by retrospective and essentially *ex post facto* legislation, conditions precedent to the exercise of that right which it was impossible to perform, and to enact that the non-performance of those conditions should forfeit the right? And this construction we are asked to give to a law which discloses a most scrupulous solicitude on the part of congress to avoid even the appearance of retrospective legislation; for it provides that the sections prohibiting the coming to the United States of Chinese laborers, not only shall not apply to Chinese laborers in the United States at the date of the treaty, but also to those who might come into the United States before the expiration of ninety days next after the date of the passage of the law, thus protecting from its operation not merely Chinese laborers *in transitu*, but laborers who might leave China before the expiration of a period of time reasonably sufficient for notice of the law to reach that country. It appears to us very plain that, by adopting the construction contended for, we should, in effect, accuse congress of gross disingenuousness, or of utter disregard of a treaty stipulation, to the observance of which the national honor was pledged." In legislation respecting rights expressly secured by solemn stipulation in a treaty sought and obtained by ourselves, affecting the good faith and honor of the United States, I cannot impute to Congress a purpose to—

"Palter in a double sense,
That keeps the word of promise to the ear,
And breaks it to the hope."

It is insisted, also, that it must be presumed that all who departed before May 6, 1882, have returned, and, at all events, they have now had a sufficient time to return, and ought not any longer to be permitted to return. If this were so, it could not affect the construction of the act. The act was as broad in its terms on the day of its passage as it is now; and it affected those who departed the day before its passage, as well as those who left a year before. The act has made no distinction and no exception on the ground of lapse of time. It might as well be insisted that one who goes away with the proper certificate shall not return after the lapse of a year or two years, where the law prescribes no such limitation. Neither the treaty nor the law prescribed any limitation as to the time when those who departed before May 6, 1882, should return. It would doubtless be proper for congress to provide that both of those who departed

without certificates before the passage of the act, and those who depart after its passage with certificates, shall exercise their right to return within some specified time, upon giving them a reasonable time to return after the passage of the act before it should be enforced against those already gone under the prior existing laws. Such a provision would doubtless be reasonable within the provisions of the treaty, and not in conflict with its provisions. But no such provision has been made, and the courts are not authorized to introduce one into the act. Nor, in the absence of such a provision, can lapse of time since the departure with the vested rights under the treaty and laws, as they existed at the time of leaving, afford any aid in the construction of the act, as it was actually passed.

For the reasons stated I am satisfied that the provisions respecting certificates in section 4 of the amended act have no application whatever to these Chinese laborers who were residing in the United States on November 17, 1880, and who afterwards departed prior to May 6, 1882; that they were not intended by the act in question to be excluded from the country for want of such certificate, or on any other grounds; and that such Chinese laborers are entitled to re-enter the United States upon their return, upon other satisfactory evidence, without producing the certificate prescribed by said section.

There is no possible difficulty or inconsistency in applying the ordinary rules of evidence to those who departed prior to May 6, 1882, as to whom no specific evidence has been prescribed, and in insisting upon the certificate prescribed for those who departed after the restriction act, and to whom this restriction is practically applicable, without abrogating the right secured to them both by the treaty and section 3 of the law. And I have no doubt that it was the intention of congress to limit the certificate prescribed by section 4 to the latter class, and leave the former to be governed by the ordinary rules of evidence. The construction I have given to this law not only reconciles the legislation with the observance of the plighted faith of the nation, but it carries out and effectuates the object of the treaty and the law. The evil to be remedied was the continued, unrestricted immigration of Chinese laborers. It was recognized that rights of those who were already here were secured by the Burlingame treaty and international law. No proposition for the expulsion, directly or indirectly, would have been made by the United States, or entertained by the Chinese government; nor, if made and admitted, would it have received the sanction of congress. Both the treaty and the law recognized these rights, and the legislation was directed solely against any further addition to the numbers of the Chinese then here, or who should come within 90 days after the passage of the act. This object, the law in its practical operation, has been attained. Not only has there been no accession to the number of the Chinese in this country, but the statistics of the custom-house show that, during the 28 months which have elapsed since the passage, the number of de-

partures exceed the number of arrivals by 12,000. Not only, therefore, has the number of the Chinese on this coast not increased, but it has been diminishing (after making due allowance for those who may have clandestinely crossed the northern boundary of the United States) at the rate which ought to satisfy the sturdiest opponent of this class of laborers,—a rate which could not be largely increased without serious disturbance to the industries of this coast. But, even if this were not so, there is a price too high to be paid, without absolute necessity, in any case, for the exclusion of Chinese laborers, and that price is the national honor. And especially, when, as I have shown, the plighted faith of the nation may be kept without impairing the effectiveness and satisfactory operation of the law. By the construction here adopted, also, the treaty and the law are in harmony; and the various provisions of the act are consistent and in accord with each other. But, on the construction insisted upon by the United States attorney and sanctioned by the presiding justice, the treaty and the law conflict, and various provisions of the restriction act itself are inharmonious and inconsistent with each other.

I therefore dissent from the decision of the presiding justice, and from the order remanding petitioner.

CASE OF THE CHINESE WIFE.

In re Ah Moy, on Habeas Corpus.

(Circuit Court, D. California. September 29, 1884.)

CHINESE IMMIGRATION—BAILING REMANDED PRISONER.

When a Chinese person, after final hearing on *habeas corpus*, has been remanded to the marshal to be deported from the United States upon the vessel by which she was brought to this country, and such vessel has departed, she cannot be admitted to bail upon a recognizance that she will appear when a vessel is ready to depart. Per FIELD, Justice; SAWYER, HOFFMAN, and SABIN, JJ., dissenting.

Application to Allow Prisoner Remanded to Give Bail.

T. D. Riordan and L. I. Mowry, for petitioner.

S. G. Hilborn, U. S. Atty., and Carroll Cook, Asst. U. S. Atty., for the United States.

Before FIELD, Justice, and SAWYER, HOFFMAN, and SABIN, JJ.

FIELD, Justice. In this case Ah Moy was remanded to the custody of the marshal, to be deported from the United States upon the vessel by which she was brought to the port of San Francisco, or some other vessel of the steam-ship company. It appears from the statement of her counsel that the vessel in which she was brought has departed, and that no other vessel of the company will leave this port

under two weeks. He therefore asks that, in the mean time, she may be admitted to bail, upon a recognizance that she will appear when the vessel is ready to depart. The application cannot be granted. According to our decision, the petitioner was, under the law, prohibited from landing. We have no authority to allow this law to be evaded upon any conditions. We cannot say she shall be allowed to land for 15 days, upon giving bail for her appearance at the end of that time, without a violation of its provisions. Application denied.

SAWYER, J., *dissenting*.¹ Ah Moy, the wife of a Chinese laborer, came from China on the steam-ship City of Tokio, with her husband, who was entitled to re-enter the United States and was permitted to land. The wife, who had never been in the country before, was not permitted to land, and was, consequently, detained on the ship by the master. A writ of *habeas corpus* having been obtained, she was produced in court upon the return of the writ, and by the court admitted to bail pending the proceeding to determine whether or not she was entitled to land. Upon the final hearing the question arising under the restriction act was determined against her, and she was remanded to be retransported to China, and ordered into the custody of the marshal for the purpose of returning her to the custody whence she had been temporarily taken under the writ for the purposes of the inquiry as to her rights. Upon attempting to execute the order to remand petitioner it was found that the ship on which she came had departed on her regular voyage, and would not return for several weeks, and that no other steamer belonging to the same company would depart for 15 days. The agents of the ship refused to receive her till a ship should be ready to leave for China. There was no other ship of any line that would depart for several days. The marshal, upon this state of facts, confined the petitioner in the county jail for safe-keeping until he could execute the order, and thereupon she makes this application to be admitted to bail pending the delay thus necessarily and unavoidably occurring. A final order remanding the petitioner having been made, and she being in custody for the purpose of executing the order, and there being no appeal, the circuit justice is of the opinion that the court has no further jurisdiction or power to admit her to bail, and that she must continue in the custody of the marshal till the order remanding her can be fully executed. From this ruling I am compelled to dissent.

When the body of a petitioner is produced in court, on the return to a writ of *habeas corpus*, the petitioner is in the control of the court. Pending the proceeding to determine her rights the court can temporarily and provisionally commit the petitioner to the party detaining her, if deemed safe and proper to do so, or may commit her to the custody of the marshal, or may admit her to bail. In either

¹ HOFFMAN and SARIN, J.J., who sat as consulting judges, concurred in the dissenting opinion of the circuit judge.

case she is in the custody of the law. When an order to remand has been made, and the petitioner placed in the custody of the marshal for the purpose of executing the order to remand, she is still in the custody of the law, and under the control of the court till the order to remand has been finally executed. The marshal is but the executive arm of the court, and while the petitioner is still in his custody, by reason of the order to remand not having been fully carried out, both she and the marshal are under the control of the court; and the court, in my judgment, has jurisdiction and authority to admit to bail during any further necessary detention or any unavoidable delay which prevents an immediate execution of the order to remand. In my judgment, the admission to bail under such circumstances and for such purposes would not, in contemplation of law, be a landing of the petitioner contrary to the provisions of the Chinese restriction act. As was said in the *Case of Ah Kee, ante*, 701, recently decided, while provisionally taken into the custody of the court, and temporarily removed from the ship in order that she may not be carried away pending the proceedings to determine the legality of her detention, in contemplation of law she has not been landed. This being so, she cannot be deemed to have been landed till the court has divested itself of its custody and control of her person by either discharging her altogether or fully executing the order to remand her. She is still in the custody and control of the law while lawfully on bail. I therefore dissent from the order denying bail.

Conceding the power of the court to admit the applicant to bail under the circumstances stated, I think it would be a great hardship, not to say a gross violation of her personal rights, to refuse it upon security satisfactory to the court. I think she should be admitted to bail. But the statute expressly provides, in case of an opposition of opinion between the judges, that a judgment or order shall be made in accordance with the views of the presiding judge. The opinion of the presiding justice must therefore prevail, till the question shall be finally decided by the supreme court on the certificate of opposition of opinion certified to it by the disagreeing judges for that purpose.

LAWTHER v. HAMILTON and another.

(Circuit Court, E. D. Wisconsin. June 2, 1884.)

PATENTS FOR INVENTIONS—LAWTHER PROCESS FOR TREATING OLEAGINOUS SEEDS.

Patent No. 168,164, granted to Alfred B. Lawther, September 28, 1875, for an improvement in processes of treatment of oleaginous seeds, compared with other methods in use previous to the granting of such patent, and *held*, that the Lawther patent cannot be sustained as a patent for a process.

In Equity.

Munday, Evarts & Adcock, for complainant.

Davis, Riess & Shepard and Fred. C. Winkler, for defendants.

DYER, J. This is a suit to restrain the alleged infringement by the defendants of a patent granted to complainant, September 28, 1875, No. 168,164, for an improvement in processes of treating oleaginous seeds. In the specifications of the patent, the patentee states that the object of his invention is "to improve the process of working flaxseed, linseed, and other oil-seeds in such a manner that a greater yield of oil is obtained at a considerable saving of time and power in the running of the crushing, mixing, and pressing machines, while also a cake of superior texture is produced." The specifications proceed as follows:

"Hitherto, it has been the practice to crush the oil-seeds between revolving rollers, and completing the imperfect crushing by passing them under heavy stones known as edge runners or mullers, under addition of a quantity of water, the crushed and moistened seed being then taken from the muller stones and stirred in a heated steam jacketed reservoir preparatory to being placed in the presses for extracting the oil. This process has been found imperfect in regard to many points, but mainly on account of the overgrinding of portions of the seed and the husks or bran when the seeds were exposed for too long a time to the action of the muller stones, so as to form a pasty mass and produce an absorption of oil by the fine particles of bran; while, on the other hand, the under-grinding, by too short an action of the stones, rendered the presses incapable of extracting the full amount of oil from the seed.

* * * * *

"My process is intended to remedy the defects of the one at present in use, and consists mainly in conveying the oil-seeds through a vertical supply tube and the feeding roller at such degree of pressure to powerful revolving rollers that each seed is individually acted upon and the oil-cells fully crushed and disintegrated. They are then passed directly, without the use of muller stones, to the mixing machine, to be stirred, moistened, and heated by the admission of small jets of water or steam to the mass, and then transferred to the presses. The oil-seeds are, by my new process, first conveyed to a hopper and fluted seed-roller at the top of an upright feed-tube of the crushing machine, by which the seeds are fed, under suitable pressure, to revolving rollers of sufficient power, which run at a surface speed of about one hundred and fifty to two hundred feet per minute. The pressure on the seeds in the feed-tube is necessary, as the oil-seeds would otherwise not feed readily into the rollers revolving under great pressure. The oil-seeds are thereby compelled to pass evenly and steadily through the rollers, which have, therefore, a chance to act on all of them, and break the oil-cells uniformly without re-

ducing any portion to a pasty condition. The bran is also left comparatively coarse, so that it shows the nature of the seed after pressing. The muller stones, and their over or under grinding of any portion of the seeds, are entirely done away with by this mode, which makes not only the machinery less expensive, but produces also a saving of power required in running the same. The crushed seeds are next placed in a steam jacketed reservoir of the mixing machine, where they are stirred, moistened, and heated by perforated revolving stirrer-arms, which throw jets of water or steam into the mass, so as to thoroughly permeate and mix the same. The crushed and moistened mass is then transferred to the presses for the extraction of the oil, which operation requires less power, on account of the uniformity of the mass, produces a greater yield of oil, and furnishes an improved quality of oil-cake or residue of open-grained, flaky nature, capable of being split in regular pieces, at right angles to the direction of pressure."

Having thus described his invention, the patentee states his claim to be "the process of crushing oleaginous seeds, and extracting the oil therefrom, consisting of the following successive steps, viz.: The crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and finally the expression of the oil from the seed by suitable pressure, as and for the purpose set forth."

Various grounds of defense to the bill are interposed, only one of which it seems necessary to consider, namely, that which disputes the validity of the patent as a patent for a process. The proofs show, and in fact it is undisputed, that formerly, in the process of extracting oil from flaxseed, the seed was subjected to the crushing and disintegrating action of the muller stones, which consisted of two large and very heavy stone wheels mounted on a short horizontal axis, and attached to a vertical shaft. By the rotation of this shaft the stones were caused to move on their edges shortly around in a circular path upon a stone bed-plate, with a peculiar rolling and grinding action, upon a layer of flaxseed placed on the bed-plate. This was the usual mechanical appliance in connection with the operating movement of the muller stones. By this means, such portions of the seeds as came in contact with the muller stones were reduced to a complete state of pulverization. To facilitate the disintegrating action of the muller stones, the seed was generally first more or less crushed by passing it through one or more pairs of rollers, thus better preparing it for the rubbing and grinding action of the muller stones. The further treatment of the seed required the application of heat and moisture, and this was accomplished in various ways. Sometimes the heat and moisture were applied by a steaming device before the seed was crushed by the muller stones. Sometimes the seed was moistened, when it was under the action of the muller stones, by sprinkling water upon the layer of seed beneath the stones, the heat being applied afterwards by a separate operation. At other times, both heat and moisture were applied after the seed had been run through the mullers, and was in the form of meal in the heater. As the last step in the process, the seed thus crushed and disintegrated, and in moist and warm condition, was usually

placed in hair-cloth mats or bags, and subjected to hydraulic pressure, by which means the oil was extracted. This was the state of the art, and this the usual process, when the complainant obtained his patent. Stating his improvement in the mode of treating the seed most favorably for the claim he makes under his patent, it consists in first crushing the seeds by the pressure of revolving rollers, but without the grinding or trituration action of the muller stones, so that, as it is claimed, each seed and each oil-cell is crushed without pulverization, and without destruction of the hulls beyond the bursting and flattening of the same. Then the seed thus crushed is subjected to heat and moisture, the moisture being applied in the form of finely separated jets of water or steam. And, as a last step, the material thus prepared is placed in pervious mats or moulds, and subjected to pressure in a suitable hydraulic press. By this process, it is claimed that greater certainty is attained in suitably crushing the entire mass of seed, and also that, from a given quantity of seed, a larger flow of oil is produced than from an equal quantity subjected to the action of muller stones; and it must be admitted that the proofs tend to sustain this claim.

The main improvement alleged is that the invention dispenses with the use of muller stones. While this is claimed as a process, there is no description given in the specifications of the vertical supply tube, the feeding roller, the revolving rollers, the mixing machine, the steam jacketed reservoir, or the muller stones; and we think there may be a question whether there is a sufficient description of the means used to effect the process which is claimed as the complainant's invention. Then the claim is the process of crushing oleaginous seeds and extracting the oil therefrom by three steps successively: the crushing of the seeds under pressure, the moistening of the seeds by direct subjection to steam, and finally expressing the oil from the seeds by suitable pressure, as and for the purpose set forth. This would seem broad enough to embrace every method of extracting oil from flaxseed known in the prior state of the art, and it is perhaps doubtful whether a claim so general and indefinite is valid. But without deciding these points, having seen what was the state of the art before the complainant obtained his patent, and, conceding everything contained in the patent itself, what new patentable process can it be said the patentee discovered or invented? The alleged invention seems to us only to consist in the omission of the muller stones as one of the means of applying the necessary pressure or crushing force to the seeds, and the use of the mullers was previously but part of one of the steps that always had to be taken in preparing the seed for the extraction of oil therefrom. It may be true that, by the omission of the muller stones, certain injurious effects upon the seed produced by the alleged grinding or tearing action of the stones are avoided. But this would seem to be due rather to a change in mechanical appliances, than to the discovery of a new and original pro-

cess, in the sense in which that term must be here considered and understood. The crushing of oleaginous seed, so that ultimately it may be in condition for the application of hydraulic pressure, was always a step, and necessarily the first step, in the process of extracting the oil therefrom. As we have seen, that step was formerly accomplished by means of rollers and muller stones. The complainant ascertained by practice that in crushing the seed, the tearing, pulverizing action of the muller stones was injurious, and so he dispensed with that mechanical operation in the crushing step of the process, and employed the rollers alone. He thereby simply omitted one of the instrumentalities previously used in the first stage of treatment of the seed. This was undoubtedly a useful improvement, but it was not the invention or discovery of a new process. Each step in the process existed and was known before; namely, crushing the seed, heating and moistening it, and finally the application of hydraulic pressure.

What the complainant accomplished was a change in mechanical appliances and operation, by which an existing process and each step thereof were made more effective in its results. For this he may have been entitled to a mechanical patent. It is claimed that the new thing discovered by Lawther was that the hulls or shells of the flaxseed could be utilized to form channels by which to convey the oil out from the mass of prepared seed; which result, it is said, was attained by omitting the muller stones and using the rollers in the first step of crushing the seed. But if such a result was produced by dispensing with the muller stones, it does not follow, we think, that this was the invention of a new process. The oil finally extracted from the seed was the product of an old process, the better results being attributable to a change in the mechanical appliances employed in the first step of the process; namely, the crushing of the seed. No new step was discovered by the patentee. According to the specifications in his patent, first, revolving rollers were employed, then muller stones, in the first essential step of crushing the seed. He discovered that more advantageous results were attainable by dispensing with the use of muller stones; and that these results were also promoted by the improved construction of the rollers and other mechanical appliances for heating and moistening the seed, is quite apparent. The discovery or invention was not of a new series of acts or steps constituting a process, but only of certain mechanical changes in carrying into effect the well-known old steps of the process.

For these reasons we are of the opinion, notwithstanding the very able briefs submitted by counsel for the complainant, that the patent in question cannot be sustained as a patent for a process.

Bill dismissed.

DRUMMOND, J., concurred.

THE LYNN.

(District Court, S. D. Georgia. January, 1884.)

COLLISION—FAULT.

Where a collision is brought about by a lack of watchfulness and care on the part of those on board a steam-vessel colliding with a schooner nearly at rest, although a whistle from a tug having the schooner in tow might have called their attention to their duty, the steam-vessel is, nevertheless, liable.

In Admiralty.

S. A. Darnell, U. S. Atty., for libellant.

Lester & Ravenel, for claimants.

LOCKE, J. This is a libel in admiralty in behalf of the United States, owners of the dredge-boat *Henry Burton*, for damage alleged to have been done her in collision with the schooner *Pierson* while in tow of the steam-tug *Lynn*. On the ninth of March, 1880, the *Henry Burton* was at work in the river opposite the wharves at Savannah, when the steam-tug *Lynn*, with the schooner *Pierson* in tow, passed down the stream. After they had passed on some 1,200 feet, the *Burton*, having completed her load of sand, followed in their wake. The *Lynn* was intending to dock her tow at a wharf on the right bank, down some half-mile, so kept along that side of the river, and, having got down as far as necessary, put her helm to starboard, stopped, and, as the schooner came by, slued her around across the river channel and over to the left bank. The *Burton*, coming down astern, put her helm to starboard, when she saw the *Lynn* had turned around, and attempted to pass to the port of the *Pierson*, or rather across her bows, as she was swinging; but, finding she was getting into shoal water on the north bank of the river and could not go clear of the schooner, stopped just in time for her jib-boom to sweep across the after-part of the steamer and carry away guys, booms, and rigging, and rip up some of the deck and bulwark plank, doing about \$100 damage.

It is claimed by the libelants that the *Burton* was pursuing her legitimate business in dredging the channel, and was therefore entitled to particular consideration; and also that the stopping and turning of the tug and tow were without any notice by whistle or otherwise. Had she been following immediately behind them, this view of the case would be reasonable; but the evidence shows that there was not far from 1,200 feet between the vessels when the *Lynn* stopped and swung around to the port. There was no obstacle to obstruct the view, but the vessels were in plain sight, and the maneuver could have been neither mistaken nor misunderstood, if seen. The steamers, after the *Lynn* had turned, were heading towards each other, and each bound to keep to the starboard, or give reasonable notice of a different intention. Constant vigilance is especially required and demanded of all who undertake to navigate the waters of

harbors; and in this case the fact that the tug was not seen when she first stopped and commenced the maneuver of turning, was the cause of the collision. Had her movements been observed, there would have been ample time to have stopped, reversed, and so far checked the headway of the Burton as to have prevented the catastrophe; or to have put her helm to the port, and taken the starboard or southern side of the channel, where there was room enough for her to pass.

The channel here is shown to be about 300 feet wide, the schooner was about 120 feet keel, and her bow was so far over on the north bank as she came round that the Burton, as is claimed, could not keep far enough off, on account of the shoal water, to pass her. There must have been, then, some 150 feet astern of her on the south bank. But, had there been any difficulty in that, the 1,200 feet should have been space enough in which to have checked her headway entirely until the schooner had swung around, and left either side clear. The tug, after turning, and at the time of the collision, was in the stream, about the middle of the channel, heading up stream, but not sufficiently under way to give the schooner any headway more than that she had by swinging; and it was actually the Burton that brought about the collision by her motion. It may be that the attention of those on the Burton would have been particularly attracted had the Lynn blown several short whistles, but it would only have called their attention to their duty, as it certainly was for them to be on the lookout as to what was going on directly in their course. Not only does the testimony of the witnesses satisfy me that the Burton was sufficiently far astern of the tug and tow, when they commenced to turn, to have either stopped or gone to the starboard, but this is more fully established by the fact that the tug had stopped, checked the headway of the schooner, turned about, and headed up stream; the schooner had stopped her headway, swung around, and shot ahead nearly or quite across the channel before the collision occurred. Had the Burton been following in the immediate vicinity of the other vessels she would, without doubt, have passed safely on the port side; but, in attempting this so late as he did, the master took the chances of success or disaster, which proved to be against him.

The libel is dismissed, but without costs.

MOORE, Adm'r, etc., v. CHICAGO, ST. P., M. & O. RY. CO.

MAHONEY v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, D. Minnesota. October 24, 1884.)

1. REMOVAL OF CAUSE—CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY—SP. LAWS MINN. 1881, CH. 219.

Chapter 219, Sp. Laws Minn. 1881, entitled "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain, and operate railroads in the state of Minnesota," not purporting to create a new corporation, but declaring that for certain purposes the foreign shall be deemed to be a domestic corporation, must be regarded as simply an enabling act, and the railway company, which was a Wisconsin corporation, is still one, and as such has the right to remove a case for trial from the state court to the federal court.

2. SAME—PROVISO PREVENTING REMOVAL VOID.

As the only scope and effect of the provision in the act, that the railway company shall be deemed to be a domestic corporation "in all suits and proceedings upon causes of action arising in this state in which it shall be a party," is to deter it from the right to submit certain controversies to the judgment of the federal court, this proviso must be held void; following *Insurance Co. v. Morse*, 20 Wall. 445, and distinguishing *Stout v. Railroad Co.* 8 FED. REP. 794.

On Motion to Remand.

Lovely & Morgan, for plaintiff.

John D. Howe, for defendant.

BREWER, J. The question in this case is whether the defendant is a Minnesota or Wisconsin corporation, and this turns mainly on the scope and effect of chapter 219, Sp. Laws Minn. 1881. The argument of counsel for plaintiff is brief and clear. They say that the question is one solely of legislative intent, and that the intent is manifest, because the act not only confers all the powers, privileges, and functions of a domestic corporation, but also, in express terms, provides "that in all suits and proceedings upon causes of action arising in this state, in which the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall be a party, it shall be deemed to be, for all purposes, a domestic corporation, and not otherwise." The argument on the other side cannot be stated briefly,—is not so clear and easy of comprehension,—and yet I think it determines the true solution of the question.

1. There is nothing in the title of the act to indicate an intent to create a corporation. It reads: "An act to authorize the Chicago, St. Paul, Minneapolis & Omaha Railway Company to acquire, construct, maintain, and operate railroads in the state of Minnesota." This discloses simply an intent to grant certain rights—included in which is not the right to incorporate—to an existing company. The constitution, art. 4, § 27, provides that "no law shall embrace more than one subject, which shall be expressed in its title." Did the legislature intend more than was named in this title, and, if it did, is the added matter valid? *State v. Kinsella*, 14 Minn. 524, (Gil. 395.)

2. The constitution, art. 10, § 2, reads: "No corporation shall be formed under special acts except for municipal purposes." Neither constitution nor statutes have extraterritorial operation. There was no Minnesota corporation answering to the description in existence before this act. This is a special act. Did the legislature intend, and, if so intended, had it the power, to evade the restrictions of the constitution and create a new railroad corporation by a special act? I am aware of the decisions of the supreme court of the state sustaining special acts granting additional powers to existing corporations as not within the constitutional prohibition of the formation of corporations; and counsel speak of this act as the adoption of a corporation chartered in another state. But the existing was a foreign corporation, and if this act did not create a second and new corporation, but only granted powers and privileges to the one existing, the right of removal to the federal court exists. Doubtless, the methods of creating corporations are within legislative discretion, and were it not for this constitutional provision the existence of a general law would not inhibit the granting of a special charter. But with that the birth of a new corporation must be traced to the powers and grants of some general statute. A statute must be supported rather than overthrown, and the intent of the legislature must be made to harmonize with rather than antagonize its powers and the constitutional limitations.

3. The act names "The Chicago, St. Paul, Minneapolis & Omaha Railway Company, a corporation created and existing under the laws of the state of Wisconsin," and all its various grants of powers and privileges are to the "said company." Significant among these grants is that of "all the rights, powers, franchises, privileges, and immunities, including the power of eminent domain, conferred by the laws of the state of Minnesota upon railway companies organized thereunder." In other words, it grants to this foreign corporation all the rights, powers, etc., given by Minnesota laws to home corporations. Clearly this discloses a mere enabling act, and were it not for the provisos at the close of the section I do not think there would be any doubt. Those provisos read as follows:

"And provided, further, that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, its successors and assigns, shall, in exercising the power of eminent domain by this act conferred, and in all proceedings and appeals therein, be taken and held in all courts and places to be a domestic corporation; and provided, further, that in all suits and proceedings upon causes of action arising in this state in which the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall be a party, shall be deemed to be for all purposes a domestic corporation, and not otherwise."

Now, at first reading, these seem to sustain the views of counsel for plaintiff; but notice these matters. They do not provide that the foreign corporation accepting the privileges granted shall become a domestic corporation, but only that for certain purposes it shall be

deemed to be such. In other words, taking the act as a whole, it grants to a foreign corporation vast privileges upon condition that, as to certain matters, it shall accept the responsibilities of and be treated as a home corporation. But this is mere license. It grants to a citizen of Wisconsin certain privileges, provided it will consent for certain purposes to be considered a citizen of Minnesota. But, if a citizen of Minnesota, what need of such provisos? And can one be a citizen for certain purposes and for them only? Let an action be brought by a citizen of Minnesota against this defendant for injuries done in the state of Nebraska, and can it plead that it is a domestic corporation and not subject to the jurisdiction of the federal courts? Where in the statutes will such a plea find support? Obviously, the true reading, the intent of this act as a whole, was to give certain privileges to a foreign corporation on condition that for certain purposes it should consent to be treated as a domestic corporation, and not to create a domestic corporation, or to give to a foreign the right to become a domestic corporation. Regarded in that light it is a mere enabling act.

And again, were this the creation of a new corporation, who are the stockholders? Who responds to the liability imposed by section 3, art. 10, of the constitution? Has a railroad corporation of Wisconsin the power to bind its stockholders to the obligations of that section, or indeed to bind itself? *State v. Sherman*, 22 Ohio St. 411. I do not enter into this inquiry, because, as I read this act, it stops a little this side of that query. It does not purport to create a domestic corporation; it simply declares that for certain purposes it shall be deemed to be such. And what are those purposes? *First*, for the exercise of the right of eminent domain; and, *second*, for suits for causes of action arising in Minnesota. When it is borne in mind that the power of eminent domain had already been expressly conferred upon this corporation by the previous words of the section, it is obvious that the whole scope of these provisos is that for certain limited litigations this foreign corporation shall be deemed domestic. And a little reflection will indicate that, outside of mere matters of procedure, such as liability to attachment, security for costs, etc., the only scope and effect of this proviso is to debar this corporation from the right to submit certain controversies to the judgment of the federal courts. It has been held by the supreme court that a condition imposed upon a foreign corporation of doing business within a state that it will not remove its controversies to the federal courts, is void. *Insurance Co. v. Morse*, 20 Wall. 445. Can this proviso be regarded in any other light than as an indirect way of attempting to secure the same result? I think not. This is very different legislation from that considered by this court in *Stout v. Railroad Co.* 8 FED. REP. 794. There was a general statute in all respects providing that a foreign corporation complying with its terms should become a legal corporation of the state, with all the rights, privileges, and franchises

of such. That, obviously, only prescribed one method of acquiring corporate existence, and did not purport to determine the conditions under which a foreign corporation should exercise privileges and acquire rights in the state.

Another matter tends to confirm the view I have taken. On the same day with the act under consideration two other acts affecting the same company were passed. In each of these, the *status* of the company as a foreign corporation was expressly recognized, with, in one, a proviso, as here, that for purposes of exercising the power of eminent domain the company should be treated as a domestic corporation. But, without pursuing this inquiry further, I hold that this legislation, not purporting to create a new corporation, but declaring that for certain purposes the foreign shall be deemed to be a domestic corporation, must be regarded as simply an enabling act; that the corporation, which was a Wisconsin corporation, is still one, and as such has the right to remove this case for trial to the federal courts.

The motion to remand must be overruled.

The case of *Mahoney v. Chicago, M. & St. P. Ry. Co.* involves substantially the same question as above, and the same order will be made in that case.

BANNER and others v. WARD and another.

(Circuit Court, D. Minnesota. February 26, 1884.)

RECORDING ACTS—CONSTRUCTIVE NOTICE—POSSESSION.

When the vendee of land does such acts thereon that reasonable inquiry would reveal his possession, a subsequent purchaser is affected with notice of his title though his deed is not recorded.

A suit is brought by the executors and trustees of Harwood W. Banner, deceased, aliens, and citizens of England, to set aside and cancel a certificate issued by the sheriff of Martin county, Minnesota, to the defendants, on a sale of real estate under a judgment obtained by them against H. F. Shearman. Shearman is the common source of title, and the land in controversy is situated about 13 or 14 miles from the town of Fairmont, where the defendants reside. The will of Banner is admitted to probate in Martin county, and the complainants are recognized as trustees and executors. Deeds of the land from Shearman to the deceased were executed respectively March 6 and 23, 1874. The defendants' judgment was docketed January 3, 1878.

W. D. Cornish, for complainants.

Warner & Stevens, for defendants.

NELSON, J. The complainants insist the relief prayed for should be granted, and the title decreed to be in them by virtue of the deeds

executed to their devisor and admitted to record four years previous to entry of judgment against Shearman. Shearman is the common source of title, and unless the deeds are notice of title in his grantee by virtue of the record, or his possession is so notorious as to indicate claim of title when the judgment was docketed, the complainants are not entitled to a decree. Two deeds were drawn and executed in England, conveying, in the first one, the S. E. $\frac{1}{4}$ of section 13, town 101, range 29, and in the second, the W. $\frac{1}{2}$ of the same section. It is claimed these deeds were not properly acknowledged, and, although admitted to record, were not constructive notice of title. The complainants' right to relief does not necessarily depend upon the registry of the deeds, and this question will not be discussed. They transferred the title; but the defendants urged that, by virtue of the law of the state, the deeds are void as to them. The defendants obtained judgment against Shearman January 3, 1878, and execution issued May 17, 1879, and the sheriff levied upon and sold the land July 5, 1879, giving the defendants a certificate as purchasers, which was duly recorded.

It may be conceded that the defendants can invoke for their protection chapter 58, Minn. St. 1858, which enacts, in substance, that "a conveyance not recorded shall be void against judgment creditors" unless the facts proved in regard to possession are sufficient to warn all persons asserting liens or suggest inquiry into the condition of the title at that time. Banner, after his purchase, sent one Sutherland as his agent from England to make improvements and manage the property; and the evidence is clear that he took all the necessary steps to hold the S. E. $\frac{1}{4}$ of section 13, town 101, range 29, and his possession as Banner's agent was notice of the latter's rights. *Morrison v. March*, 4 Minn. 422, (Gil. 325.) The defendants have no better standing in court than a *bona fide* purchaser without actual knowledge of Banner's possession; and the failure to make inquiry to obtain knowledge of the facts about the land is willful neglect, and equivalent to actual notice of possession to the extent of this quarter section, which was embraced in the deed of March 6, 1874. The W. $\frac{1}{2}$ of this section is prairie land, uninclosed, and was conveyed to Banner by deed executed March 23, 1874. Sutherland, as agent, has asserted ownership for the grantee over this land since 1874; he authorized grass to be cut, planted slips or cuttings of the cottonwood tree at the corners as early as 1875, and after a house and barn were built in 1877, upon the S. E. $\frac{1}{4}$ of the section, leased the W. $\frac{1}{2}$, in connection with the first tract, to tenants for pasturage and cutting hay. Rork, Arnold, and Shepardson were successively tenants; and the latter two cut grass and pastured sheep upon the W. $\frac{1}{2}$ of the section. It was recognized in the sparsely-settled neighborhood as "Sutherland's land" and has been occupied in this manner from 1874 to 1882. These facts show possession sufficiently notorious and exclusive, when the condition and character of the land is taken into consideration, to

compel inquiry in regard to the title; ordinary prudence would suggest it.

The judgment creditors never saw the land. It was located many miles from their residence, in a sparsely-settled part of the country, and the nearest cultivated tract, except the adjoining S. E. $\frac{1}{4}$ of the section, was three or four miles distant; so that the least inquiry of the farmers and laborers in the vicinity would have put any one, who desired to ascertain the ownership, in the way of obtaining the information. It should have been made; and if the defendants had exercised ordinary care, this litigation would have been avoided.

The cases cited by defendants' counsel are not in point. In *Dutton v. McReynolds*, 16 N. W. Rep. 468, the land was conveyed to three persons as tenants in common; one went into possession and subsequently purchased the interest of his co-tenants, but failed to record the deed executed and delivered to him, before a judgment was docketed against one of his grantors, and the court held that the continued possession of the grantee was not notice of his claim of title or possession under the unrecorded deed from one of his co-tenants.

It is my opinion that the defendants gained nothing by the sale under the judgment, and the complainants are entitled to a decree, which is granted.

GILLETTE v. CITY OF DENVER.

BROWN v. SAME.

(Circuit Court, D. Colorado. October 16, 1884.)

1. SEWER ASSESSMENTS—ACCORDING TO AREA.

Assessments for sewer purposes, levied according to area and regardless of improvements, is a valid mode of assessment under the Colorado constitution.

2. SAME—NOTICE—WHEN ASSESSMENT IS DETERMINED BY A MERE MATHEMATICAL COMPUTATION NOTICE IS UNNECESSARY—DUE PROCESS OF LAW.

Act of the legislature, Colorado, of February 19, 1879, amending the charter of the city of Denver, provides for the construction of sewers and the levy of assessments therefor according to area and regardless of improvements, on the petition of a majority of the property holders resident in any sewer district, or upon the recommendation of the board of health. The act also provides that, during the progress of the work, all persons interested shall have an opportunity to object to the materials used, the manner in which the work is done, or any supposed violation of the contract. *Held*, that the levy of the assessment being a mere mathematical computation, and as to all prior proceedings full notice is provided for, it is unnecessary that the act should provide an opportunity for lot-owners to be heard on the assessments after they are levied, and that making such assessments a fixed charge against the lots, without notice or an opportunity to be heard, is not depriving the lot-owners of their property without "due process of law."

3. SAME.—EQUITY WILL NOT ENJOIN COLLECTION OF TAX ON THE GROUND OF IRREGULARITY OR ILLEGALITY.

In an action brought to restrain sale of land to pay delinquent tax or assessment, equity will not grant an injunction, restraining collection of tax or

assessment on the ground of irregularities in the levy or illegality of the tax or assessment.

4. JURISDICTION OF FEDERAL COURT—DUE PROCESS OF LAW.

Jurisdiction of federal court cannot be invoked on the ground that the act under which the proceedings are had violates the constitution of the state, unless it also violates some provision of the federal constitution.

Petition for Injunction. The facts are stated in the opinion.

John Q. Charles, James H. Brown, and John W. Webster, for complainants.

Frank Tilford, Henry T. Rogers, and Lucius M. Cuthbert, for defendants.

BREWER, J., (*orally.*) In the case No. 1,217, *Gillette v. City of Denver*, a bill has been filed to enjoin the collection of certain sidewalk and sewerage taxes. So far as the sidewalk taxes are concerned, the question as to them has been settled by the supreme court of the state, and is not now pressed for consideration. The special demurrer runs only to the sewerage tax. It is claimed by the complainants that this tax is void, because the act of the legislature under which the proceedings are had is unconstitutional in two respects: *First*, it provides for an assessment of the tax upon the property within the district according to the area, ignoring all improvements placed upon it, and not according to the value of the property; and the question involved is whether it is within the power of the legislature, under your constitution, to assess these special taxes upon property according to the area. In the case which went to the supreme court of your state, involving the sidewalk tax, where the act provides for collecting the tax according to the frontage, the act was sustained. I am unable to see any distinction in principle between the two. If you can collect a sidewalk tax by a levy upon the adjacent lots according to their frontage, which, of course, ignores all question of value or improvements, I can see no reason why you can not collect a sewerage tax upon property according to the area. In both cases all matter of improvements, all question of value, is ignored; and so, without discussing the question, it seems to me, under the decision of your supreme court, that that objection must be overruled. The second objection is that under the act there is no such notice provided for as will create "due process of law;" and in reference to the sidewalk ordinance and the proceedings thereunder, the supreme court have held that there was not "due process of law," and have set aside those taxes. A distinction is sought to be made between sidewalk proceedings and those in reference to sewerage. What is "due process of law," is one of those questions which it is more easy to ask than it is to answer. The supreme court of the United States have very carefully said that there is as yet no full and definite answer to the question. In the case of *Davidson v. New Orleans*, 96 U. S. 97, the court, by Mr. Justice MILLER, uses this language:

"But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. * * * As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us: That whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law."

And in a subsequent case, (*Hagar v. Reclamation Dist.* 111 U. S. 708; S. C. 4 Sup. Ct. Rep. 663,) the court, by Mr. Justice FIELD, uses this language, after discussing more generally what "due process of law" may be:

"But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments."

As stated by Mr. Justice BRADLEY in his concurring opinion in *Davidson v. New Orleans*:

"In judging what is 'due process of law,' respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

And again:

"Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes, (not dependent upon the extent of his business,) and generally specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter."

And then goes on to speak of where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, and holds that a different principle comes in. Now, in this case, the tax is levied by the area; no question of value, no matter of judgment,—a mere *mathematical calculation*; and of what earthly profit could it be to a tax-payer to have notice of that calculation? He can make it

himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be. In the proceedings to assess this tax and to do the work, there are three steps: *First*, there is the making of the contract for the building of the sewer; *second*, there is the building of the sewer, the performing of the work; and, *third*, the mere mathematical calculation,—the apportionment of the cost. As to the latter, no notice can be required, because notice would be of no avail; as to the first, the statute provides that the city council may not act except upon the petition of a majority of the property holders, or a recommendation of the board of health; it acts only by ordinance; the contract can be let only on advertisement. Every citizen is bound to take notice of the ordinances of the city; so that anterior to the making of the contract he has all the notice which can be required; and the statute also provides, in reference to the doing of the work, that while the work is proceeding, on the complaint of any citizen or tax-payer that any public work is being done contrary to contract, or the work or material used is imperfect or different from what was stipulated to be furnished or done, the council shall examine into the complaint, may appoint three commissioners, etc.; so that in reference to the making of the contract the performing of the contract, there is provision for notice; and as to the mere apportionment of the tax, it is one of those things as to which in the nature of things no notice can be required, because no notice would be of value. So that, within the definitions laid down in these cases in the supreme court of the United States, it seems to me that it must be held that there was no violation in that statute of that provision of the federal constitution forbidding the taking of property without "due process of law."

But that only advances us one step. It is charged in the bill and on demurrer, it must be taken to be true, that there were irregularities in the exercise of this power; that tax-warrants have been issued for a sum largely in excess of the cost of the sewer; and this statute provides that the cost of the sewer shall be charged upon the lots in dispute; and the question now arises: What is the duty of the court, in this equitable case, where work is irregularly done, defects appear in the proceedings of the council, and an excess in the amount of the warrants? In reference to that, this is the rule laid down, in a very carefully considered case, by the supreme court on these general questions, in the *State Railroad Tax Cases*, that went up from Illinois. 92 U. S. 575. (This, it must be borne in mind, is an equitable action to restrain the collection of the entire tax levied upon these lots.) In the syllabus it is stated:

"While this court does not lay down any absolute rule limiting the course of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality nor irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the

law, provided it be constitutional, nor any grievance which can be remedied by a suit at law either before or after the payment of the tax, will authorize an injunction against its collection."

And in the fourth proposition:

"No injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full."

And in order that it may be seen that that is not the language of the reporter, and an improper deduction from the opinion, I turn to the language of the opinion itself, where, on page 613, Judge MILLER says:

"It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity." [Quoting half a dozen cases. And then further:] "But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity." "It is a profitable thing for corporations or individuals, whose taxes are very large, to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when, in the end, it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed." "We are satisfied that an observance of this principle would prevent the larger part of suits for restraining collection of taxes which now come into the courts. *We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases.*"

Applying that rule here, it is alleged in the bill that these sewers had been constructed, that their cost was a certain sum, that the area within the district is also of a certain extent. Now, conceding (and it must be under the allegations of the bill) that there were irregularities in the proceedings sufficient in an action at law to defeat the title transferred by a conveyance, yet the complainants stand in the attitude of saying to this city: "You shall not collect a dollar of the cost of this sewer, because you have tried to collect more than you were entitled to, because of some irregularity in the proceedings to collect that tax; while we admit that the sewer has been built, that it really cost so much, and that, as must be conceded, under the provisions of statute and the ordinance our property has been benefited to that extent." It seems to me that equity will not interfere in such a case. There is no allegation in the bill of payment or tender. I think the bill in respect to that matter is there-

fore defective, and demurrer to that portion of the bill which seeks to restrain the collection of the sewerage taxes will be sustained.

In the case of *Brown v. City of Denver*, 3 Colo. 169, which presents the same questions substantially, with this additional fact: The plaintiff is a citizen of Colorado, and comes into this court invoking the jurisdiction of the federal courts, on the ground that his property is being taken without "due process of law," in violation of the provision of the fourteenth amendment. I do not think it is necessary to say any more than I have said. It does not seem to me that under the allegations of the bill it can be held that there was a lack of due process of law, and I do not think that a citizen of the state can come into the federal courts and litigate with a citizen of the state any other than a federal question. So I have not considered several questions made by counsel as to supposed infractions of other portions of the constitution.

The special plea to the jurisdiction will be sustained.

PARKHURST and others v. HOSFORD and another.

(Circuit Court, D. Oregon. October 31, 1884.)

1. VENDOR AND VENDEE—INADEQUACY OF CONSIDERATION.

Mere inadequacy of price is not sufficient to avoid the sale of real property; but when such inadequacy is gross, and the vendor was needy and of weak mind, and acted upon the impression that he was indebted to the vendee, when he was not, equity will give relief by treating the vendee as the trustee of the property for the benefit of the vendor or his representatives. Four hundred dollars held to be a grossly inadequate price for property worth not less than \$1,500.

2. INSANITY—OPINION OF NON-PROFESSIONAL WITNESS.

Upon the trial of an issue involving the sanity of a person, the opinion of a non-professional witness, based upon his own observations, is competent evidence, and is entitled to weight according to the intelligence of the witness, his means of information, and the character of the derangement.

3. VENDOR AND VENDEE—NOTICE OF PRIOR EQUITY.

A purchaser of real property for a valuable consideration is not affected by notice of a prior adverse equity received from a stranger or person not interested in the property; nor will mere rumors or hearsay concerning such equity, and communicated by such person, be sufficient to put him on inquiry, and charge him with knowledge of the facts that he might have thereby learned.

Suit to Set Aside a Conveyance.

Rufus Mallory and William M. Ramsey, for plaintiffs.

W. H. Holmes, for defendant Hosford.

E. J. Dawne, for defendant Schindler.

DEADY, J. The plaintiff C. T. Parkhurst and 15 others, citizens of Kansas, Illinois, Massachusetts, Indiana, New York, and California, respectively, bring this suit against E. F. Hosford and John Schindler, citizens of the state of Oregon, for relief against a conveyance made by Lewis Parkhurst in his life-time to the defendant Hosford, of a tract

of land situate in Polk county, and containing 318 acres; and also a subsequent conveyance made by said Hosford of a portion of the same premises to the defendant Schindler, upon the ground of the insanity or imbecility of Parkhurst at the date of the conveyance to Hosford, and the inadequacy of the consideration therefor. The case was heard on the bill, answer, and replication thereto, and the evidence. The defendants answered separately, but not under oath. The answer of Schindler contains the defense that he was a purchaser in good faith and for a valuable consideration, and also the statute of limitations. The answers, not being under oath, are not evidence for the defendants, and the rule invoked by counsel for Hosford, that his answer must be taken for true, unless overcome by the testimony of two witnesses, or that of one witness and circumstances equivalent to another, does not apply. The answer of Hosford admits the conveyance from Parkhurst to him, and from him to Schindler, but denies the insanity of the former, and the inadequacy of the consideration, and the alleged value of the premises now and at the time of such conveyances. The evidence is voluminous and quite contradictory on the disputed points. The plaintiffs examined 32 witnesses, whose testimony covers 305 legal cap pages, while the defendants examined 37, whose testimony covers 416 such pages.

The following facts are admitted or satisfactorily proven:

Lewis Parkhurst was a native of Dana, Massachusetts, from whence he emigrated to Wisconsin in 1843, and thence to Oregon in 1848. Soon after, he occupied the premises in question, and some time in 1850 became a settler thereon, under the donation act of September 27th of that year. Having subsequently complied with the provisions of said act, the land was set off to him by the proper authority as claim No. 70, and on February 9, 1866, a patent was issued to him therefor. This donation includes parts of sections 8, 9, and 10, in township 7 S., of range 3 W., and is situate in Polk county, on the west bank of the Wallamet river, about three miles below Salem. About one-third of it is prairie, and the rest of it is covered with scattered timber and brush, and the greatest portion of it is bottom land, consisting of a dark sandy loam, and in extreme high water is subject to overflow. Parkhurst was born in 1817, and was never married. He lived alone in a cabin on his donation, and maintained himself principally by days' work in the neighborhood. The defendant Hosford and his brother, C. O. Hosford, settled on the public land adjoining Parkhurst's donation about 1849, and for some years thereafter the latter worked more or less as a sawyer in the defendants' saw-mill. Parkhurst was a Methodist, and so are the Hosfords,—C. O. Hosford being a preacher in that denomination,—and on this account, as well as their nearness of residence, Parkhurst appears to have been more intimate with them than any one else, and had great confidence in the defendant. In time he seems to have been possessed with the idea that he was Jesus Christ, the Lion of Judah, and claimed the right to have carnal communication with women at his pleasure.

In 1860 he was arrested on a charge of an indecent assault upon a woman of the neighborhood, a connection of C. O. Hosford's, and was discharged on giving bond in the sum of \$250 for his good behaviour. The evidence on this point is indefinite, but nothing more was done in the matter, and it is probable that the charge was not well founded, and was predicated as much on his foolish talk about women as anything else. But, however this may be, Parkhurst was by some means impressed with the idea that he was in

danger of being mobbed on that account, and left the county and went to C. O. Hosford's, who had about the same time removed to Multnomah county, and settled a short distance east of Mt. Tabor, for whom he worked on the farm about three months. Then he probably went to the east of the Cascade mountains, in the direction of the gold mines that were discovered there about this time. In the winter of 1861-62, C. O. Hosford says he roomed awhile in Portland, and that he worked for him again six weeks during the summer of 1862, and in the fall of that year he returned to his donation and assisted the defendant Hosford in building a house on the latter's place. In the spring of 1863 he left the county again and went to Washington territory, and "took up" a homestead on Mill plain, about two miles back of the Columbia river and eight miles above Vancouver, and about six miles east of C. O. Hosford's place. In January, 1864, he sent a letter from there to C. O. Hosford for the defendant, in which he proposed to sell the latter his donation for the sum of \$400, stating, at the same time, it was "worth \$5,000 in gold and silver," but that he was willing to sell it for "a little price," so as to pay the defendant Hosford what he owed him, which he said was "about two hundred and fifty dollars," and to "get a little money" for his present needs. On the receipt of this letter the defendant Hosford went to his brother's place, from which they both went to Mill plain, where they found Parkhurst alone in a hut in the timber, and very anxious for \$150, wherewith to purchase an outfit to enable him to be employed in driving cattle to the mines east of the Cascade mountains. On the same day—February 12th—the terms of the sale were agreed on, and they all then went to Vancouver, where Parkhurst executed a conveyance of the premises to the defendant Hosford, which the latter had prepared beforehand and brought with him, in the presence of C. O. Hosford and H. K. Hines, a Methodist preacher of that place, in consideration of the sum of \$400, paid as follows: \$200 in currency as the equivalent of \$150 in coin, though it was not then worth more than 65 cents on the dollar, and the discharge of the said indebtedness of \$250, without interest, although the defendant wanted to charge interest thereon for four or five years at the rate of 2 per centum per month.

Within a year after this transaction Parkhurst returned to the neighborhood of the defendant, without any means, and took up his abode in the old cabin on his donation, saying, with much emphasis, that he had come to stay there. Thenceforth he led an aimless, doleful life, living mainly on raw vegetables, going dirty and ragged, and often sleeping in the fence corners, saying that the devils would not let him sleep in the cabin, until August 18, 1866, when, on the petition of sundry of the neighbors, he was brought before the county judge of Polk county and duly committed to the insane asylum, under the act of September 27, 1862, (Or. Laws, 620,) as an indigent, insane person, where he remained until his death, on November 30, 1879, leaving the plaintiffs, his brothers and sisters, or their children, his sole heirs. When first committed to the asylum, Parkhurst was classed among the "doubtful" patients, but after two years he was placed among the "incurables," where he remained until his death. To the last he was impressed with the idea that some persons in Polk county wanted to kill him; and he also fancied some one was trying to chloroform him.

The evidence as to the value of the donation is very contradictory; but I am satisfied that, at the date of the conveyance to the defendant, it was not worth less than five dollars an acre, and probably more. Mr. B. F. McClench, a disinterested and competent witness, who has lived within four miles of the land since 1852, swears that in 1864 it was worth from six to eight dollars an acre, and from twelve to fifteen dollars at the commencement of this suit. But the sale by

the defendant Hosford of two-thirds of the land to the defendant Schindler in 1881, for \$8.50 an acre, is a material circumstance upon this question of value. It has been suggested in the argument that Hosford made this sale for less than the land was really worth, under the apprehension that the heirs were about to claim it. But there is no direct proof to that effect, and nothing in the circumstances gives any countenance to the suggestion. The grantor appears to be a shrewd man, in good circumstances, and no immediate want of money. Neither did the sale exonerate him from liability in the premises, as his deed to Schindler contained a covenant of general warranty, for any breach of which he is well able to respond in damages.

But the consideration named in the deed—\$400—is less than one-third of the real value of the property at the time of the sale, and upon any view of the matter this must be regarded as a grossly inadequate price therefor. *Seymour v. Delancey*, 6 Johns. Ch. 222; 2 Pom. Eq. Jur. § 927, note 3. But, as Parkhurst had a right to sell his land to Hosford for any price he chose, or even give it to him, the mere fact of gross inadequacy of price is not of itself sufficient to avoid the sale. 1 Story, Eq. Jur. § 245; *Seymour v. Delancey*, 6 Johns. Ch. 232; 2 Pom. Eq. Jur. § 926. But the disproportion between the price and the value of the subject is so great in this case as to cast the burden of explanation on the vendee, and require him to show that the vendor, with a true knowledge of all the circumstances, deliberately fixed on this price. But where the transaction purports to be a sale, and there is nothing in the circumstances of the case or the relations of the parties to suggest that the vendor intended or might have made the vendee the recipient of his bounty, under the guise of a sale, for a very inadequate or merely nominal consideration, such gross inadequacy of price may furnish satisfactory evidence of some serious overreaching or advantage on the part of the vendee as would justify the interference of a court of equity. Story, Eq. Jur. § 246; 2 Pom. Eq. Jur. § 928, note.

Now, there is nothing in the circumstances of this case to indicate that Parkhurst might knowingly and deliberately dispose of his property to Hosford for anything less than its real value. His only apparent motive for making the sale to Hosford was to pay him what he seemed to think he owed him, and to obtain a little money to meet his present and urgent necessities. Add to this what I think was always present in his mind, the apprehension of danger from parties in Polk county, which made him more or less afraid to live there. He declared at the time of the disposition of the property that it was worth "five thousand dollars in gold and silver," and although there was an attempt made, both in the evidence and the argument, to show that he meant \$500, it came to nothing. Parkhurst was evidently a man of limited education, and the letter in which he proposed to dispose of his donation is somewhat difficult in places to decipher, more on account of the chirography than the orthography,

though that is peculiar; but the words "five thousand dollars" are as plain as any in it, and could not well be mistaken for "five hundred." And, *first*, was Parkhurst mistaken about the indebtedness to Hosford; and was he induced to part with his land upon a false impression in that respect? There is no doubt but Parkhurst thought he owed Hosford \$250, and I think the discharge of this obligation was a controlling circumstance in the disposition of his property to the latter. Upon the evidence, minus Parkhurst's admission, however, I am of the opinion that the indebtedness is not proven; and that the attempt to do so is very unsatisfactory, and calculated to cast suspicion upon the whole transaction.

In the spring of 1883 the plaintiff C. T. Parkhurst came to Oregon to look after this matter for himself and co-plaintiffs. They had lost sight of the deceased, and do not appear to have known anything of his death or the disposition of his property until 1881. Parkhurst visited the defendant Hosford at his house twice in the month of April, 1883, with a view of a settlement. According to Parkhurst's testimony, Hosford first told him that the deceased owed him \$800, and that he bought the property for \$600, having done so to get what he owed him, but on looking at the deed admitted he only paid \$400. Hosford also produced the letter from the deceased, and read it to the witness as if the latter had said the place was worth only \$500 instead of \$5,000, and his wife, who was present, read it the same way. Hosford said this \$800 was for money loaned to the deceased to live on, and \$250 he had to pay as security on a bond to get the deceased out of jail, and money he had to pay the sheriff for expenses. At the second interview, Hugh V. Matthews was present with Parkhurst, and he testifies that on that occasion the latter taxed Hosford with having read the letter to him on the former interview wrongly in respect to the phrase "five thousand dollars," and Hosford did not deny it. Both testify that he admitted that the deceased was a weak-minded man and sometimes insane on the subject of religion, but claimed that he was all right at the time of the sale and conveyance of the land. In his testimony Hosford denies having read the letter wrongly in respect to the value of the land, or that he told the plaintiff he went security for the deceased, and had to pay \$250 on that account or to get him out of jail, but stated that he was indebted to him in the sum of \$250 for small amounts of money loaned to him at one time and another, he could not say when, and for \$172 or \$72 advanced to Mr. Holman, sheriff of the county, when deceased was under arrest, to enable him to go east of the mountains, and that he never kept any memorandum of these transactions, or took any obligation or acknowledgment from the deceased on account of them. In his answer Hosford states that this sum of \$172 or \$72 was advanced by him to some one, presumably the sheriff, at the request of Parkhurst, as he understood, to procure his discharge from imprisonment. But it does not appear that he had any personal communica-

tion with Parkhurst from sometime before the latter's arrest until the fall of 1862, but rather the contrary.

There is no evidence that there ever was any breach of the bond given by Parkhurst to keep the peace, and the contrary is the reasonable inference from all the facts; and therefore it is quite certain that Hosford never was called upon to pay the penalty of it. And if he ever deposited any money in lieu of such bond, as was suggested on the argument that he might have done, it was not forfeited either, for the same reason, and, in the due course of proceedings, must have been returned to him within six months,—the limit for which a security to keep the peace could then have been required. Or. Code, 1854-55, p. 242. True, the magistrate who took this security might also have required Parkhurst to pay the costs of the examination, and, in default thereof, have committed him, (Or. Code, 1854-55, p. 243;) and the defendant Hosford might have furnished the money for that purpose and thereby procured his discharge from imprisonment, as he alleges in his answer he did. But there is no evidence of anything of this kind, nor is there any claim or suggestion to that effect in the argument or brief of counsel. Besides, Hosford has deliberately testified that he gave the money to the sheriff at the request of Parkhurst, as he understood, not to procure the discharge of the latter from imprisonment, but to enable him to go to the mines. Neither does it appear reasonable that Hosford would advance money to a third person for Parkhurst without any written request or communication from the latter, for such an indefinite purpose as either to get him out of jail or to enable him to go to the mines, without taking a receipt or some written evidence of the fact; and it is also improbable that he would furnish money for such a purpose under such circumstances and make no memorandum of it, nor be able to now state the amounts any more definitely than that it was either \$172 or \$72.

The prayer of the bill is that the conveyance to Hosford be declared null and void and of no effect, or that he and his grantee, Schindler, be required to convey the premises to the plaintiffs. If Parkhurst, at the date of the conveyance to Hosford, was a lunatic, a person generally insane,—incapable of understanding and acting intelligently in the ordinary affairs of life,—his deed is not only voidable, but void. This point is now settled for this court by the decision of the supreme court in *Dexter v. Hall*, 15 Wall. 9. A number of witnesses have testified *pro* and *con* on the question of Parkhurst's insanity, but none of them are medical experts, and the evidence is objected to by the defendants on that ground. The witnesses knew Parkhurst in his life-time, more or less intimately, and, having stated their relations with him and means of knowledge, expressed their opinion as to his sanity. The Oregon Code of Civil Procedure (section 696, sub. 10) permits an intimate acquaintance to testify as to the sanity of a person, the reason of the opinion being given. But the admissibil-

ity of evidence in the national courts in equity and admiralty cases is not governed by the law of the state, but by the general rules of evidence as established by the decisions of the courts and defined by approved authors and commentators. Neither section 858 of the Revised Statutes, regulating the competency of witnesses in the national courts, nor section 914, prescribing the law of procedure and practice in civil actions at common law therein, touch the question.

The question of the admissibility of the opinion of a non-professional witness upon an issue of insanity came before the supreme court lately in the case of *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, S. C. 4 Sup. Ct. Rep. 533, when it was held admissible. In delivering the opinion of the court Mr. Justice HARLAN said: "Whether an individual is insane is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject." And the "judgment" of a non-professional witness, he adds, "based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value, because the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species." It is not suggested in the opinion that any particular degree of intimacy should have existed between the witness and the person whose sanity is the subject of inquiry, but that the weight to be given to the witness' opinion must depend upon the intelligence manifested by him on his examination, "and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached," as well as the degree and character of the insanity.

Upon the issue of insanity, the burden of proof is on the plaintiffs. The law presumes that Parkhurst was sane, and capable of disposing of his property in any way he chose. *Hall v. Unger*, 4 Sawy. 680. His commitment to the insane asylum by the county judge of Polk county in August, 1864, as an "indigent insane" person, is *prima facie* evidence of his general insanity at that time, and so long thereafter as he was confined in the asylum in pursuance of the same. But how far, if at all, the result of this inquiry affects the question of Parkhurst's insanity in February, 1864, depends on circumstances. So far as it indicates an habitual and chronic lunacy, which, in its nature was likely to have existed for some considerable time prior thereto, it tends to show unsoundness of mind in 1864. Dr. J. R. Sites, the physician who examined the deceased on the inquiry before the county judge, and on whose certificate he was committed to the asylum, states therein that "the supposed cause" of his insanity was "religious enthusiasm and self-abuse." But the evidence is not satisfactory to

my mind that Parkhurst was generally insane—*non compos mentis*—in February, 1864, or prior thereto, so that he was incapable of making a contract. At the same time, it is manifest that he was drifting that way, or sinking in the scale of sanity from the time of his arrest in 1860, and it is probable that that fact, with the attendant circumstances, did much to impair his mental equilibrium. Two delusions or *manias* followed this event, and were largely consequences of it: one, that a mob in Polk county purposed to do him bodily harm, and another, that Hosford had in some way incurred an expense or charge of \$250 in getting him out of the clutches of the law. It is not proved that Hosford intentionally caused, or directly promoted or encouraged, these delusions, although there are some circumstances in the case calculated to excite suspicion that he did. For instance, at the time of the purchase of the premises, he undertook to make Parkhurst believe that he owed him interest on the \$250 at the rate of 2 per centum per month for about five years, which would have amounted to \$300, and swallowed up, twice over, the small sum in money which Parkhurst was expecting to receive for his present necessities; and this, too, in the face of the fact that by his own admission there was no contract to pay interest, and when he must have known that by the act of October 16, 1862, (Or. Laws, 623,) then in force, that only 10 per centum per annum could be recovered in any case where there was no contract to pay more, and then only for 12 per centum per annum, and that prior to that time there was no law regulating interest in the state, and that none was recoverable, except where there was a special contract to that effect. And poor old Parkhurst does not seem to have known enough to dispute directly this unconscionable claim, but, prompted by his necessities, he pushed it one side, insisting that, however that might be, his proposition was that he would take \$150 over and above what he owed Hosford, be that more or less, which sum was finally paid him in greenbacks at \$20 more than their market value.

But while it is not proven that Hosford is responsible for the delusions under which Parkhurst labored, it does satisfactorily appear that he took advantage of them to purchase the premises for a grossly inadequate price from a man who had long confided in him, and whom he knew to be much in want and generally weak in mind. This being the case, the sale and conveyance to Hosford was inequitable, fraudulent, and unjust, (*Scovill v. Barney*, 4 Or. 291; *Holmes v. Holmes*, 1 Sawy. 103; 2 Pom. Eq. Jur. § 928;) and, so far as he is concerned, he must be treated as trustee for the heirs. The defendant Schindler is a *bona fide* purchaser for a valuable consideration, unless it appears that he had notice of the plaintiff's equity at the time he made the purchase, or information thereof sufficient to put him on inquiry whereby he might have ascertained the fact. The only evidence upon this point is the testimony of M. Croisan, a German, who appears to have lived in the neighborhood from about 1876.

He testifies that about the time Schindler was negotiating for the purchase of this land he told him, substantially, that there would be trouble about it some day; that the general talk was that Hosford had gotten the land unjustly from a crazy man. This is denied by Schindler in a general way, to the effect that he had never heard anything against Hosford's title; and from the fact that he is a German and does not speak English, and appears to have been poorly interpreted, his testimony is general, vague, and indefinite. But, admitting that Croisan told him what he said he did, it is not sufficient to charge him with either "notice" or "knowledge" of the plaintiff's equity, or the invalidity of Hosford's title. It did not constitute "notice," because Croisan was a mere stranger to the property and the parties, and in no way interested in the transaction. 2 Pom. Eq. Jur. 602; *Hardy v. Harbin*, 1 Sawy. 203. It did not impart "knowledge" of the plaintiffs' equity to Schindler, because Croisan knew nothing about the matter, and did not profess to. He only repeated what he said was rumored in the neighborhood,—that Hosford had obtained the property of a crazy man, unjustly, some 16 or more years before. Neither was it sufficient "information" to put Schindler on inquiry. It furnishes him no clue or guide to an investigation of the matter, and pointed to no person or place where information could be obtained.

If a person about to purchase an interest in real property obtains or receives information tending to show the existence of a prior adverse right to such interest, which information, considering its character and source, is sufficient to put a prudent man on inquiry, which inquiry, if prosecuted with reasonable diligence, would lead to a discovery of such prior adverse interest, then the reasonable inference is that he acquired such knowledge and had actual notice thereof. And if such person negligently, or for the purpose of keeping himself in ignorance, fail to make such inquiry, he is nevertheless chargeable with "notice" of the facts he might thereby have ascertained. But such person is not affected by mere rumors, hearsay statements, vague suggestions, surmises, and the like, concerning the existence of such prior adverse interest. The information must be credible in its character and source, and sufficiently circumstantial to furnish him with a palpable clue or guide by means of which he may investigate the matter and ascertain the truth. 1 Story, Eq. Jur. § 400*a*; 2 Pom. Eq. Jur. § 597. In 1881 Schindler had no means of ascertaining whether Parkhurst was insane or not in 1864. The information which Croisan says he gave him on the subject amounted to nothing. Even after this thorough investigation of the subject with the aid of the process of this court, and the diligence and astuteness of learned and industrious counsel, this court is unable to say that Parkhurst was generally insane at the date of his conveyance to Hosford, and that, therefore, the same is *ipso facto* void and of none effect.

I find that the defendant Schindler is a purchaser in good faith

and for a valuable consideration, without notice or information of the prior equity of the plaintiffs, and therefore the bill as to him must be dismissed, with costs. As to the defendant Hosford, a decree will be entered that within 30 days he convey to the plaintiffs by a good and sufficient deed, with a warranty against his own acts, that portion of the Parkhurst donation not heretofore conveyed by him to the defendant Schindler, and that he also pay to the plaintiff a sum of money equal to the price received by him from said Schindler for the remainder of said donation, to-wit, the sum of \$1,804.85, together with \$457.22, the legal interest thereon, from the date of the sale to Schindler, to-wit, August 29, 1881, in all the sum of \$2,262.07, and that in default of said payment within 30 days the plaintiffs have execution therefor. The bill also prays for an account of the rents and profits; but the matter was not pressed on the argument, and I have concluded on the evidence that the amount paid Parkhurst, with that expended in taxes, repairs, and improvements, is sufficient to offset the claim for rents and profits.

SANDERS *v.* BARLOW and others.

(Circuit Court, D. Colorado. October 14, 1884.)

1. CHATTEL MORTGAGE — VALIDITY OF, WHEN UNRECORDED, AS AGAINST GENERAL CREDITORS OF AN ESTATE.

A mortgage which is good against the deceased is also good against his administrator and the creditors. The rule as laid down in the case of *Stewart v. Platt*, 101 U. S. 731, governs.

2. SAME — EFFECT OF WRITTEN GUARANTY OF ONE MORTGAGEE TO ANOTHER.

Where two mortgagees stand on equal footing, and are to be paid out of the same fund, the promise in writing of one mortgagee that he will see the other paid, postpones the mortgage of the former and gives priority to the latter.

3. STATUTE OF FRAUDS — CONSIDERATION NEED NOT BE EXPRESSED — FORBEARANCE A CONSIDERATION.

Under the statute of frauds, where a promise in writing is made to pay whatever one party owes another, it is binding, though no consideration be expressed. Forbearance to enforce a debt is sufficient consideration moving to such a promise.

In Equity.

Wells, Smith & Macon, for complainant.

H. C. Dillon, for defendants.

Before BREWER and HALLETT, JJ.

HALLETT, J., (orally.) A bill has been filed by Minnie Sanders against James H. Barlow and others, to enforce a lien on a certain fund in the hands of the surviving partner and administrator of Samuel M. Sanders, deceased, arising from a chattel mortgage given by Sanders, in his life-time, to one F. H. Mather, and by said Mather assigned to the plaintiff. The plaintiff was the wife of said S. M. San-

ders. This mortgage was executed to M. Mather on the twenty-sixth day of April, 1880, to secure a loan, as it is said, of the wife's money to her husband. Mr. Sanders was in partnership with Mr. Aux in keeping a livery-stable, and the mortgage was given upon his interest in that business. Four days later, on the first of May, Mr. Sanders gave another mortgage to William S. Jackson on the same property, to secure a loan previously made by Jackson to him. The plaintiff's mortgage was not recorded until after Mr. Sanders' death. Mr. Jackson's mortgage was never recorded. The bill is against Barlow, Sanders' administrator; Aux, the surviving partner; Minnie Bell and Bessie Elizabeth Sanders, children of Mr. Sanders; and Jackson, the other mortgagee. Some question was made upon the original bill, by demurrer thereto, before Mr. Jackson was made a party to the suit, as to the effect of this mortgage; whether it could be asserted against the rights of the general creditors of the estate, not having been put on record during the life-time of Mr. Sanders, nor until after the debt from him to the plaintiff had become due. It should be remarked, also, while the plaintiff's debt was overdue a month or more at the time of Mr. Sanders' death, and before the mortgage was recorded, some part of Mr. Jackson's debt had also become due prior to that time, but not the whole of it, I believe. Upon that question, as to the validity of the mortgage against the general creditors of the estate upon demurrer to the original bill, it was thought that the case of *Stewart v. Platt*, 101 U. S. 731, would control; and according to the doctrine of that case, the mortgage, being good against the deceased, was good also against his administrator and the creditors. This point was raised again here in argument on the final hearing, but it is not considered necessary to go over the authorities again on this subject. Undoubtedly a different rule is laid down in some cases in the supreme court, and certainly it is in some of the courts of the states. But this is the latest case, and we are to follow the last one, whatever it may be.

Upon this hearing another question has arisen between these mortgagees. Assuming the general rule that the first in time shall be the first in right, and that these mortgages stand upon an equal footing otherwise, the question has arisen as to whether a certain paper, executed by Mrs. Sanders during her husband's last illness, shall be sufficient to give priority to Mr. Jackson's mortgage. This letter bears date September 29, 1880, and is addressed to William S. Jackson, and is as follows:

"DEAR SIR: Mr. Sanders is too sick to attend to business, and I wish to say that I will be responsible for whatever he owes you or the El Paso County Bank, and see that the same is paid.

[Signed]

"MRS. S. M. SANDERS."

As to the circumstances under which this paper was given, it seems from the testimony of Mr. Barlow and Mr. Jackson, who are the only ones who speak of it, that Mrs. Sanders came to the bank, in which

Mr. Jackson is interested, and expressed a desire to see Mr. Jackson with reference to the indebtedness of Mr. Sanders to the bank. Mr. Jackson was informed of this soon afterwards, within an hour or so perhaps, when he came to the bank, but he was not in just at the moment she called. Upon receiving this information from Mr. Barlow, Mr. Jackson said that he would be satisfied if Mrs. Sanders would give her written obligation to become responsible for the money due to him. Mr. Barlow proceeded to his own house, where he soon after met Mrs. Sanders. It seems there was some understanding between them that they should meet there, and she was informed of Mr. Jackson's wishes in the premises when she wrote this note. Whether it was in consequence of any step taken by Mr. Jackson towards foreclosing the mortgage, or taking possession of the property with the view to secure his claim and collect his debt, does not appear, except that Mr. Jackson states that he was about to proceed in that way. And Mr. Barlow also says that Mr. Jackson was moving in the matter. So far as Mrs. Sanders' action in the premises is concerned, it would seem that she was acting by her husband's request; that he had become anxious in the matter. This is Mr. Barlow's testimony:

"I know that Mrs. Sanders sent word to the bank to see Mr. Jackson and myself in regard to the amount that Mr. Sanders owed Mr. Jackson, and would like to see one of us, and I went to see Mrs. Sanders, who was then at my house, and she stated to me that Mr. Sanders was very nervous over his indebtedness to Mr. Jackson, and that every one coming in he would inquire if that was Mr. Jackson. She stated to me that she would see this indebtedness paid; that she had ample means to make it good. She then asked me to see Mr. Jackson, and see what would be satisfactory. Mr. Jackson's mortgage was then due, and he was moving to take possession of the property, or get a new mortgage to secure it, and Mrs. Sanders said her husband was too sick to attend to business. I then saw Mr. Jackson, and he said that if Mrs. Sanders would write him to that effect, in writing, that he would be content. I told Mrs. Sanders what Mr. Jackson said, and she said that that was what she wanted to do, and did write a letter to that effect, saying she would see the claim paid."

Mr. Jackson said:

"After she had first sent me word that I could not see Mr. Sanders because he was too sick, but that she would see me paid, I then asked Mr. Barlow to have her put it in writing, which she did. She was the first one who suggested that she would see me paid; otherwise, I should proceed to take possession of the property under my chattel mortgage."

The plaintiff was not examined upon this question as to the circumstances under which this paper was given, and so there is nothing in the record on the subject except the statement of these two witnesses. Now, if this is to be regarded as a valid agreement, made upon sufficient consideration,—a forbearance by Jackson to sue, or to press his claim against the personal property,—it seems to me that the effect of it would be to postpone the plaintiff's mortgage to that of the defendant Jackson; because, if two persons have a claim upon the same fund in respect to demands of equal dignity, and one of

them is liable to the other for the payment of the same demand, I should say that he who is liable for the ultimate payment of the money would be postponed to the other. At the argument I suggested that there would be some difficulty about this writing, and counsel said that if so it must be as an estoppel on the part of this woman to assert any claim under her mortgage; and it seemed to me so then. But upon looking at the matter more closely, considering the fact that she does not seek to avoid her promise in any way, that there is nothing to show that she then knew of the Jackson mortgage, or had any knowledge of it, and consequently she could not know that she was postponing this demand upon that property, I should say that it lacks the essential elements of an estoppel. In so far as Jackson may have been misled to his prejudice by her promise to pay, there may be one element of estoppel, but the others seem to be wanting. Aside from any question of estoppel, assuming that there is nothing in the nature of deceit in any of these transactions, if there be a valid promise from the plaintiff to the defendant Jackson to pay his debt, it must be that he has a prior right to recover from this fund. It is said that the fund is hardly sufficient to pay one of these parties, not both. If that be true, there cannot be much propriety in allowing her to take the fund in the first instance, to be subject to another action upon this agreement, on the part of Jackson, to recover it. But in that respect the agreement is not well pleaded in the answer. *First*, it occurred to me that it might, perhaps, be necessary for Mr. Jackson to file a cross-bill to assert his claim to the fund. But of that I have some doubt. It would seem to be sufficient for him and the others to rely upon any valid claim that they may have to the fund, without seeking to assert here such a right to it as can be given by decree; and as to his ability to assert such a demand in this court against the surviving partner and the administrator, who are citizens of this state, as well as against the plaintiff, who is a citizen of another state, there may be some doubt. I do not see before me the joint answer of the defendants which was filed to the amended bill, but in that answer there is some mention of this paper,—a very slight one; but it is not sufficiently pleaded to establish it as a valid agreement between the parties. Of course, to make it such, it must be shown to have been given upon good consideration, and as a guaranty of the debt of another, and the facts in relation to it must be set up. There may be also some question as to whether the agreement is sufficient under the statute of frauds, as not expressing a consideration. But to that I have not given much attention, except to notice that in this clause of the statute of frauds there is nothing said as to the consideration, while in other clauses of the same statute it is provided that the consideration shall be expressed in the agreement; and I observe that in two cases in the supreme court of the United States such agreements were upheld, although the consideration was not expressed in them. But upon the

construction given to the statutes of frauds in the states from which they were removed,—that is, from Virginia and New York,—they are early cases; one in 6 Cranch, I believe, and the other in 1 Pet. It seems the supreme court of the United States follows the construction given in the courts of the state, and I am not aware that this question has been ruled on in the supreme court of this state. But I have arrived at the conclusion that to establish the ultimate rights of these parties, and prevent further controversy in respect to the matters involved, the defendant should be allowed to set up this agreement in their answer in a manner to establish it, if that can be done; and upon that the plaintiff may, if she sees proper, have an opportunity to give her testimony in respect to it; and the other parties can give further testimony upon that issue if they see proper. That I regard as now the only question in the case. If that should be determined for the plaintiff, she would be entitled to a decree; if against her, of course the bill must be dismissed.

BREWER, J. In the case of *Sanders v. Barlow* the facts are these: Mr. Sanders, in his life-time, executed two chattel mortgages—one to the father of his wife, and one, a few days later, to Mr. Jackson; that to the father of his wife being transferred by him to Mrs. Sanders. Neither mortgage was placed on record or on file prior to the death of Mr. Sanders, yet, for the purposes of this case, both must be taken to have been given for value, and to have been valid as against the mortgagor and those claiming under him. Pending the last sickness of Mr. Sanders, and after the Jackson mortgage became due, Mrs. Sanders executed this paper. It it addressed to Mr. Jackson, and reads as follows: "DEAR SIR: Mr. Sanders is too sick to attend to business, and I wish to say that I will be responsible for whatever he owes you and the El Paso Co. Bank, and will see that the same is paid." And this is signed by her. The case was submitted on the testimony then taken to my brother Hallett, at the last term, I believe, who, finding both mortgages to be valid as against the mortgagor and those claiming under him, said that in reference to this paper the testimony and pleadings were not sufficiently full to determine whether the effect of this instrument was to subordinate the claims of Mrs. Sanders to this of Mr. Jackson,—that is, to postpone her mortgage to his,—and therefore directed some additional pleadings to be filed, and gave the parties leave to take additional testimony to explain the circumstances which attended the making of this letter, and such pleadings were filed and testimony taken. Mrs. Sanders denies ever giving the letter; but, comparing her signature to the deposition with the signature to the letter, there is very little reason to doubt but what she did sign the letter. Further than that, other testimony is to the effect that she did execute it, and it must be held that she did sign and send it. But, denying this, she gives no explanation of the circumstances under which it was writ-

ten. From the testimony of Mr. Jackson and Mr. Barlow it appears—and in some measure the testimony of Mr. Jackson is corroborated by that of Mr. Aux—that Mr. Jackson, after the maturity of the note secured by his mortgage, while taking no legal measures, having commenced no suit, yet went to the place where the stock mortgaged was, and took an inventory, and was preparing to institute proceedings. At this time Mr. Sanders was sick with what proved to be his final sickness, and Mrs. Sanders went to the bank to see Mr. Jackson, but not finding him in, told Mr. Barlow that Mr. Sanders was very much worried about his indebtedness to Mr. Jackson; that he was very nervous, and if any one called at the house he at once asked if it was Mr. Jackson; that he was too sick to attend to business, and she wanted to do something about it. He told her he would see Mr. Jackson and let him know. In this interview she said she was possessed of some means, and that whatever Mr. Sanders owed to Mr. Jackson she would pay. Mr. Barlow told Mr. Jackson of the interview, and he said it was all right if she would sign a paper or letter to that effect. He went to her and told her, and she was satisfied and executed this paper, and Mr. Jackson desisted from all further proceedings or effort to enforce his claim.

Now, the question is, whether the effect of this agreement postpones her claim to his. The validity of such an instrument under the statute of frauds has been carefully argued by counsel. It has been said that it is not valid under such statute for three reasons: *First*, the parties did not specify the amount of the promise, but it is a promise to pay whatever he owes you, and it is said that it is not valid because it leaves open to parol testimony the amount which the party promised to pay; and, *secondly*, that no consideration is expressed in the letter; and, *third*, that there was no consideration.

Reversing the order of these questions, we think there was a consideration. Forbearance to enforce a debt is a consideration for a promise. That Mr. Jackson might have taken legal means to enforce his right is unquestionable; but he forbore, and the act of forbearance is consideration for a promise.

Secondly, it is not necessary in a promise of this kind that the consideration should be named. The language of this section of the statute is, "any promise must be in writing;" not any agreement, as in some other portions, and as to which there have been wide differences of opinion in the decisions of courts for many years. So far as the first question is concerned, *i. e.*, as to the failure to state the sum which she promised to pay, my own judgment is that even as an obligation under the statute of frauds the contract would be good,—“whatever can be made certain is certain;” that whenever a party promises to pay whatever is owed by one to another, it is sufficient, although no sum is named. Just as a promise by one party to convey all the real estate he owns in a county is good as a contract, although it takes testimony to prove what that real estate is.

But it is not necessary to go so far as this in this instance, but it is only necessary to say that this is an agreement which, whether good or not under the statute of frauds, is binding so far as to postpone her rights to his, and it is plain to me that her claim should be postponed.

This is an equitable action, and I think it is enough to hold that, equitably, she is bound by that agreement. Generally, it is equitable that a party perform his promises; and it is inequitable that he be released from its obligations by reason of any mere technicality. So, it is equitable that she, having written this letter and made these promises, with knowledge of what it imported, cannot now be permitted to repudiate it. It is always a presumption that one making a promise like this to pay an indebtedness knows all that is included in that promise. But, further, we have the testimony of Mr. Barlow that she did know of the debt and mortgage; hence no question of misunderstanding or mistake arises, and equitably she is bound by this promise.

My conclusion, therefore, is that, equitably, she is bound by this letter, and that thereby she postponed her rights in the property to Mr. Jackson; and that, in accordance with the conclusion reached by Judge HALLETT in a prior opinion, the bill must be dismissed.

KELLY and another v. TOWN OF MILAN.

(Circuit Court, W. D. Tennessee. October 22, 1884.)

1. MUNICIPAL BONDS—RAILROAD SUBSCRIPTION—TENNESSEE CODE, §§ 1142-1165—ACTS OF TENNESSEE, 1871, c. 50—CODE § 491a—ACT 1872, c. 20—CONSTITUTION OF TENNESSEE, ART. 2, § 29.

There is nothing in the constitution of Tennessee, art. 2, § 29, or the act of 1871, c. 50, Code, § 491a, to enforce it, nor in the Code, §§ 1142-1165, nor in the act of 1872, c. 20, to authorize municipalities in Tennessee to issue bonds in aid of a railroad enterprise, either directly or in payment of subscriptions to its capital stock.

2. SAME SUBJECT—IMPLIED POWERS.

Neither can the power to issue such bonds be implied from any power conferred by these acts, nor from the general law governing municipalities. It can only exist by some special law applicable to the particular municipality, or some general law granting it. The doctrine of the case of *Green v. Town of Dyersburg*, 2 Flippin, 477, on this subject, reasserted.

3. SAME SUBJECT—CASE IN JUDGMENT.

Where a town, by a vote of the people, subscribed \$12,000 in aid of a railroad enterprise in consideration that the road should pass through said town, issued its bonds for that sum, and received a like sum in the stock of the railroad company, *held*, that the bonds were void for want of legislative authority to issue them.

4. SAME SUBJECT—RECITALS—ESTOPPEL.

And where the bonds recited on their face that they were issued "in pursuance of law," and one of the statutes relied on provided that towns having more than 1,000 inhabitants might issue bonds in payment of their matured

liabilities, the recital does not estop the town from showing that in fact it did not have the requisite population; because neither by the statutes nor by any other law was the duty devolved on the officials issuing the bonds, or the town itself, to ascertain the population. It was a matter *in pais*, as much open to the payee and holders of the bonds to ascertain as to the town itself.

5. SAME SUBJECT—RES ADJUDICATA—CONSENT DECREE—RATIFICATION.

Nor is the town estopped from making the defense of a want of legislative power by reason of the fact that certain tax-payers and the board of mayor and aldermen filed a bill in chancery setting up the want of power and enjoining the original holder from negotiating the bonds; in which suit, the railroad company having demurred, there was a compromise agreement between the parties that the town should take the stock and issue the bonds, that the court should declare them valid, overrule the demurrer and dismiss the bill; and that in pursuance of the agreement a decree was, by consent of parties, entered on the minutes of the court reciting the agreement and decreeing according to its terms. Such decrees, when pleaded as *res adjudicata*, are not binding, and a town cannot by such a process either ratify its void bonds or preclude itself from making the defense when sued upon the coupons by a subsequent holder for value. Conflicting authorities on this subject reviewed, and the rule stated with its limitations and restrictions.

6. PRACTICE—WAIVING JURY—REV. ST. § 649.

The stipulation to submit a case to the court without a jury must distinctly waive a jury according to the terms of the statute.

This suit was brought to recover of the defendant an indebtedness evidenced by 144 coupons of \$35 each, cut from its certain 12 bonds, together with 7 per cent. interest thereon. The defendant filed a plea of *non est factum* under oath, and a plea that plaintiffs were not *bona fide* holders, without notice, etc. The plaintiffs joined issue, and, under the Tennessee practice, by leave of the court, further filed a replication, to which the defendant rejoined, and plaintiffs demurred to the rejoinder. The replication, rejoinder, and demurrer are as follows:

REPLICATION.

And the said plaintiff comes, and for replication to the defendant's plea above, says that heretofore, in the chancery court for the county of Gibson, in Tennessee, at Humboldt, and before one of the chancellors of said state, the defendant instituted suit against the payee of said bonds, and certain other persons, holders thereof, by filing its bill in said chancery court against said Mississippi Central Railroad Company, H. S. McComb, and others, alleging that said bonds were invalid, and praying to have same so adjudged, and to be surrendered to the defendant herein and cancelled; and thereafter, to-wit, on the — day of January, 1875, in said chancery court, a court of competent jurisdiction, said parties, complainants and defendant, being before the court, a decree final was rendered, adjudging and decreeing that said bonds and coupons were legal, and valid and binding obligations against said complainant therein, the town of Milan, who is the same defendant herein, a full and true copy of which decree is herewith filed as a part and parcel of this replication, as though herein set forth in so many words. Wherefore the plaintiff says that said matters are *res adjudicata*, and this the plaintiffs reply to defendants' said plea above, and are ready to verify, etc.

HOLMES CUMMINS, Attorney for Plaintiff.

REJOINDER.

(1) And now comes the defendant, and, for rejoinder to the plaintiff's replication setting up the defense of *res adjudicata*, says that the said decree relied upon for said defense, while rendered in the cause mentioned in said

replication, is not conclusive on it and ought not to affect its right, and because it avers, sets forth, and pleads that said decree was brought about and procured by imposition, combination, and fraud between the said A. M. West, as vice-president of the New Orleans, St. Louis & Chicago Railroad Company, and the agents and attorneys of this defendant, by which a decision and sentence in said cause of the court upon the matters involved for trial were prevented, and that said decree was designed as no honest exposition of the merits of the case, but was brought about, allowed, and consented to for the purpose of giving the same effect as *res adjudicata* upon points in litigation not honestly contested. (2) And for further rejoinder to said plea of *res adjudicata* this defendant says it ought not to be concluded or estopped by said decree, because it was not the result of honest litigation or the judgment of the court upon the issues involved in said cause, but was brought about and founded upon the unauthorized consent of certain agents and attorneys of defendant, who had no power to give such consent or bind defendant in the premises. (3) And for further rejoinder to said plea of *res adjudicata* the defendant says that it ought not to be concluded by said decree, for the reason that the same was not rendered upon the issues involved in the cause in which it was pronounced, and the court rendering the same was without power to bind or conclude this defendant thereby. (4) And for further rejoinder the defendant says it is not concluded by said decree, because it was not rendered in favor of a party to the record, but in the interest and behalf of a stranger thereto, who colluded with the agents and attorneys of this defendant, and thereby prevented and defeated the honest and earnest litigation which said cause was instituted for the purpose of having tried and determined. (5) And for further rejoinder, the defendant says it ought not to be concluded by said decree, because the suit in which it was pronounced was begun by defendant for the purpose of honestly and earnestly contesting and having declared void certain so-called bonds executed in the name of the defendant, but without authority or power to bind defendant by the same, and thereafter certain persons combined with the agents and attorneys of this defendant to defeat the purposes of said litigation and to procure a decree without trial and sentence of the court, but by the unauthorized consent of the agents and attorneys of defendant, and, without the point being, in fact, litigated, to have said bonds declared valid and binding obligations of this defendant, in the manner so stated in said decree, all of which was the result of fraud and collusion, therefore without force and effect as *res adjudicata*; the said bonds so pretended to be declared valid by said fictitious litigation being the same bonds on which the coupons sued on in this action were attacked.

SP'L HILL, and
GANTT & PATTERSON,
Attorneys.

DEMURRER.

In this cause said plaintiffs demur to the several rejoinders filed herein by the defendant to the replication of the plaintiff herein, and for causes of demurrer say: *First.* Neither of said rejoinders, nor the matters therein set up and pleaded, constitute any defense in law, and are not sufficient in law for answer or defense to plaintiffs' said replication of *res adjudicata* or estoppel by judicial decree. *Second.* That defendant, having been a party to said cause and decree set up and pleaded in plaintiffs' said replication, cannot be heard in this collateral proceeding to aver or plead that said decree final, etc., was procured by fraud or collusion or imposition. Said defendant being a party to that cause and that decree, can only avail itself of such matter against it by a direct proceeding to annul the said decree for such fraud, etc. *Third.* That defendant in this collateral proceeding cannot avail itself of the matter that the action of its agents, in consenting to said decree set up by

plaintiffs in their said replication, was unauthorized, etc., because defendant can only act through its mayor, its chief executive, and to impeach said decree for that account must so do in a direct proceeding for that end, defendant having been a party thereto. *Fourth.* That said chancery court being a court of general jurisdiction, and in said cause that jurisdiction having been invoked by defendant as complainant therein, it is concluded by said final decree as to all questions involved in the subject-matter therein, and said decree adjudges the same issue against defendant that it now sets up anew. *Fifth.* And that defendant, being a party to said cause and said decree, is bound thereby until same has been set aside in a direct proceeding for that end, and cannot in this collateral proceeding plead that either a stranger or a party thereto colluded with defendants' agents to prevent and defeat honest and earnest litigation therein.

Wherefore, etc.

HOLMES CUMMINS,
Attorneys for Plaintiffs.

The following stipulation of the parties was thereupon entered into and filed as a part of the record in the suit:

STIPULATION.

In this cause it is agreed between the parties that the statements herein are true, and the same may be used and relied on by either or both parties, as evidence on any hearing or trial of this cause, or on any motion for a new trial, same being the facts connected with matters in controversy, viz.:

First. That the coupons sued on were issued with and represent interest upon bonds issued by defendant in payment of a stock subscription made by defendant on the — day of —, 187—, to the Mississippi Central Railroad Company. Said subscription was for the sum of \$12,000, and in payment thereof (12) twelve bonds, each for the sum of \$1,000, were issued, bearing date the — day of —, 187—, and payable 20 years thereafter, with said coupons and others of like amounts thereto attached, representing the interest on said bonds.

Second. That at the time of making such subscription said railroad company was about to extend its line from Jackson, Tennessee, to Cairo, Illinois, and said subscription was to aid in making such extension, and to secure its location through defendant's town.

Third. That said railroad extension was completed on the — day of —, 1873, the same running through defendant's town limits as it stipulated for; and the same has been operated ever since that date.

Fourth. The following is a copy of one of said bonds, the others being the same except as to numbers:

"No. 1.

\$1,000.

"*State of Tennessee, Town of Milan:*

"Be it known, that the town of Milan, by its mayor and aldermen, in consideration of the location of the Mississippi Central Railroad by said town, the citizens thereof, in pursuance of the laws of Tennessee authorizing the same, have agreed to issue bonds payable on twenty years' time, to the amount of twelve thousand dollars, with annual interest at seven per cent., with coupons attached, in bonds of one thousand dollars each.

"And whereas, the people of Milan voted the same by a majority, and in the form required by law, the vote being in pursuance of due notice, and in all respects according to the laws of Tennessee, said bonds to be payable to the Mississippi Central Railroad, under lease and control of the Southern Railroad Association.

"Now, be it known, that the town of Milan, by its mayor and aldermen, in pursuance of the authority given by the people thereof, and in obedience

to the duty required of them, issues and delivers this bond, being one of twelve, and said town of Milan hereby acknowledges itself to owe and be indebted to ——— or bearer in the sum of one thousand dollars, which sum said town of Milan binds itself to pay in lawful money of the United States to the Mississippi Central Railroad Company, or to the order of the Southern Railroad Association or bearer, in the city of New York, on or before the first day of July, in the year of our Lord one thousand eight hundred and ninety-three, with interest at the rate of seven per cent. per annum, payable annually on the first day of July of each year, on presentation of the proper coupons hereto annexed. And the town of Milan, by its mayor and alderman, hereby pledges the legal responsibility and the faith of said town for the payment of said coupons and bond according to the terms and effect hereof.

"In testimony whereof, the mayor and aldermen of the town of Milan have caused the signature of the mayor to be hereto set, and the seal of the corporation to be affixed, this first day of July, 1873, A. D.

"A. JORDAN,

[L. S.]

"Mayor of the Town of Milan."

Fifth. That on or about the tenth of July, 1874, said A. Jordan and others, residents and tax payers of said town of Milan, instituted proceedings in one of the courts of chancery of said state, to-wit, in the chancery court at Humboldt, in Gibson county, for the purpose of avoiding the liability of said town upon said bonds, the said railroad company and others being made defendants thereto.

The following is a full and true copy of said proceedings and of the decree, the same being final, rendered by said chancery court thereon. Said decree was not appealed from and still remains in full force, viz.:

"THE BILL.

"*To the Hon. John Somers, Chancellor, holding the Chancery Court at Humboldt, Gibson County, Tenn.:* Complainants A. Jordan, W. J. House, J. G. Boyd, M. L. Baird, Wilson G. Williamson, S. F. Rankin, and J. H. Dickinson show to your honor that they are citizens and residents of the town of Milan, in the Thirteenth civil district of said county; that said town of Milan is by law an incorporated town or city, and complainants reside within the corporate limits, and are tax-payers within said corporation; and the said Jordan is the legally elected and qualified and acting mayor of said town, and the other complainants are the aldermen of said town, duly elected and qualified, and together constitute the board of mayor and aldermen in and for said town or city.

"Complainants further show that they were duly qualified, and entered upon the discharge of their duties as mayor and alderman of said town, on the twelfth of January, 1874, and their term of office continuing for one year from the date of qualification.

"Complainants further show that upon an inspection and examination of the minutes and record of the proceeding of their predecessors in office, they find the following entry, of date May 11, 1872: 'The board was convened by order of the mayor. Present—A. Jordan, mayor; W. M. McCall, M. B. Harris, J. H. Dickinson, J. M. Douglass, W. E. Reeves, W. H. Algea, aldermen. On motion, it was ordered that 12 bonds, of \$1,000 each, with coupons attached, payable 20 years after issuance, bearing interest at 7 per cent. per annum, be issued by the corporation of the town of Milan, Tennessee, to the Mississippi Central Railroad Company, upon the following conditions, namely: That the Mississippi Central Railroad Company be extended from Jackson, Tennessee, to the town of Milan, and intersect or cross the Memphis & Louisville Railroad at the point agreed upon by Col. Read, chief engineer of the Mississippi Central Railroad, and the committee on behalf of the corporate

authorities of the town of Milan, near S. P. Clark's residence; the interest on said bonds to be paid annually; and that the town marshal open and hold an election on the twelfth day of June, 1872, within the corporate limits of said town, for a ratification or rejection of said proposition; and on the seventeenth day of June, 1872, said board again met, when the following proceedings were had, as appears from the said minutes: 'The board met pursuant to adjournment. Present—A. Jordan, mayor; W. M. McCall, M. B. Harris, J. M. Douglass, W. H. Algea, and W. E. Reeves, aldermen. The minutes of the former meeting were then read and adopted. The election was held on the twelfth day of June, 1872, for the ratification or rejection of the action of the board of mayor and aldermen of the town of Milan, in regard to the issuance of the \$12,000 in bonds to the Mississippi Central Railroad Company, upon certain conditions. The returns of said elections show a vote of 117 for subscription, and two no subscription;' and at the same meeting appears the following entry: 'W. M. McCall and W. H. Algea were appointed a committee to correspond with Judge Milton Brown, of Jackson, Tennessee, in regard to the proposition of Milan corporation in regard to issuing the \$12,000 in bonds to the Mississippi Central Railroad Company.' Complainants show that the foregoing entries, all of which appear upon the minutes of said board of mayor and aldermen, constitute all the proceedings in regard to the subscription of said \$12,000 in bonds, and in regard to the election held for ratification or rejection of their action in directing the issuance of said bonds. Complainants charge that there is nothing to show the manner in which said election was held, or by whom the returns thereof were made, nor is there anything to show that the required number of votes were polled in favor of said proposition, as required by law.

"Complainants further charge that the order or ordinance of said board directing the issuance of said bonds was wholly without authority, illegal, and void: *First*, because, as they charge, that said ordinance was adopted and said election ordered without any previous, contemporaneous, or subsequent application, in writing or otherwise, to said board for said purpose by commissioners appointed to open subscription books, for stock to said board, or by the board of directors themselves, or by any one else authorized so to do, as required by section 1144 of the Code of Tennessee; and, *secondly*, because said election was ordered to be held and was held by the town marshal or constable, and not by the sheriff of the county of Gibson, as required by section 1143 of the Code of Tennessee in such cases; and, *thirdly*, because, as they charge, the said marshal, after the polls were opened at said pretended election, and before they were declared closed, either by himself or some pretended deputy, removed and suffered to be removed from the place in said town fixed for holding elections and receiving ballots, the ballot-box, or box in which the votes were deposited, to various other places in said town, and did at these various places receive and put into the ballot-box the votes of certain persons offered for said purpose at these various places not fixed by law as a place of voting at said election, and this, too, without any authority whatever; and, *fourthly*, because, as they charge, there was not only no application made to said board, as required by section 1144 of the Code, but that none could have been properly made at said time, because, as they expressly charge, the entire line of the contemplated road in which the stock was to be taken had not been surveyed by a competent engineer, and substantially located by designating the *termini* and approximating the general direction of the road, and no estimate of the grading, embankment, and masonry had been made by the engineer of said road, or any one else authorized to do so under oath or otherwise; and no such estimate as required by section 1145 of the Code of Tennessee has ever been filed with the board of mayor and aldermen of said town by any one. And, *lastly*, complainants charge, on information and belief, that at the time of ordering said election,

and at the time it was pretended to be held, the population of the town of Milan was less than one thousand inhabitants, and therefore not authorized by law to take stock in railroads, issue bonds, or levy a tax for their payment. Notwithstanding all these facts, the said board of mayor and aldermen did on the twenty-third day of June, 1873, make the following order, to-wit: 'On motion of W. M. McCall the mayor was instructed to issue twelve bonds to the said Mississippi Central Railroad Company of the denomination of \$1,000 each, with interest from date of issuance at the rate of 7 per cent. per annum,' and thereupon said mayor did prepare 12 bonds, designated as the 'Bonds of the Town of Milan,' of \$1,000 each, payable to the Mississippi Central Railroad Company, or bearer, 20 years from date of issuance, and dated July 1, 1873, bearing 7 per cent. interest per annum, to which bonds then were attached coupons for the payment of said interest on the first day of July of each year said bonds have to run. Each one of said bonds, and the coupons thereto attached, were signed by A. Jordan, mayor and recorder, and were issued on that date. And on the fourth day of August, 1873, said bonds, with the coupons attached, were delivered to said Mississippi Central Railroad Company through James Hall, the treasurer and cashier of said road, who executed the following receipt:

"MILAN, August 4, 1873.

"Received from A. Jordan, mayor of Milan, Tennessee, twelve thousand dollars in bonds of the town of Milan, Tennessee, 12 bonds of \$1,000 each, payable first July, 1893, interest at the rate of 7 per cent. per annum, payable annually on the first July in each year.

"JAMES HALL, Cashier Southern R. Association."

"Said bonds and interest were made payable, as — believe, in the city of New York, N. Y.

"Complainants further charge that said bonds, with the coupons, one year's interest on which was due July 1, 1874, are still in the possession of said Hall, or some other officer or agent of said Mississippi Central Railroad Company, or under their control and management; and complainants are advised that they are attempting to collect the interest due on said bonds. Complainants are advised that they are not bound, as a corporation or otherwise, to pay said bonds; that their issuance was contrary to law; but they are advised that should said company sell said bonds to innocent purchasers, they would be bound in law to pay the same; and they are advised and believe, and so charge, that the officers of said road will sell and assign said bonds with the view of making said corporation of Milan liable, if they have not already done so in part.

"Complainants further charge that said Mississippi Central Railroad Company, by its officers and agents, as they are advised and believe, and so charge, are attempting to negotiate said bonds, and will do so unless restrained by the timely interposition of your honor's writ of injunction. The premises considered, complainants pray that they be allowed to file this bill in their official capacity, and as individual tax-payers of the town of Milan, for themselves, and on behalf of all the tax-payers of said town, against the said Mississippi Central Railroad Company, under lease and control of the Southern Railroad Association, which said railroad is located and operated through the Thirteenth civil district in Gibson county, Tennessee, with an office and place of business in the town of Milan, in said Thirteenth civil district, and a local agent or agents there, and against James Hall, treasurer, and a citizen of Madison county, Tennessee; and against H. S. McComb, who is the president of said Mississippi Central Railroad Company, under lease of the Southern Railroad Association, and is a citizen and resident of New York city, in the state of New York; that spa's and copy issue to sheriff of Gibson county, Tennessee, commanding the said Mississippi Central Railroad Company to

answer this bill; that spa's and copy issue to Madison county, Tennessee, requiring said James Hall to answer this bill on oath, and state in whose possession and under whose control said bonds are, and if assigned, sold, hypothecated, or otherwise disposed of, let him state when, where, to whom, and for what consideration; that publication be made as to said H. S. McComb, requiring him also to answer under oath to the interrogatories put to James Hall, and that in the mean time let an injunction issue, restraining said Mississippi Central Railroad Company, as well as the said James Hall, and H. S. McComb, and all the officers, agents, and attorneys of said company, or of the said Hall and McComb, from selling, transferring, assigning, pledging, or in any other manner disposing of said bonds or coupons thereto, or from collecting the same; and on final hearing, they, for themselves and other tax-payers, pray that said bonds and coupons be delivered up and canceled; that said injunction be made perpetual; and if it should appear in the progress of the cause that any of said bonds have been disposed of to third persons, they ask to have them made defendants, if necessary, for the protection of the rights of their ——. And they pray for general relief. This is the first application for writs of injunction in this cause.

"JOHN L. WILLIAMSON, Sol.

"*State of Tennessee, County of Haywood*: Personally appeared before me, Alexander Duckworth, C. and M. chancery court, at Brownsville, Haywood county, Tennessee, Arch Jordan, one of the complainants in the foregoing bill, and made oath in due form of law that the facts set forth in the foregoing bill as of his own knowledge are true, and those on information he believes to be true.

"ARCH JORDAN.

"Subscribed and sworn to before me, this July 10, 1874.

"ALEX. DUCKWORTH, C. and M.

"*State of Tennessee, Haywood County*: The clerk and master of the chancery court at Humboldt, Tennessee, will issue the writ of injunction as prayed for in the foregoing bill, upon complainant's giving bond with security in the sum of one thousand dollars, conditioned and payable as required by law in such cases.

H. J. LIVINGSTONE,

"July 10, 1874. Chancellor Tenth Chancery Division of Tennessee.

"THE DEMURRER.

"In the Chancery Court at Humboldt, Tennessee.

"*A. Jordan and G. Boyd, M. L. Baird, W. G. Williamson, S. F. Rankin, J. H. Dickinson vs. Miss. Cent. Railroad, H. S. McCombs, and James Hall.*

"The defendants demur to complainant's bill, and for cause of demurrer say: *First*, because there is no equity in the bill of complainants to entitle them to a decree; *second*, because the bonds having been determined by order of the board of mayor and aldermen, as alleged in the bill of complainants, they cannot set up irregularities or departure from duty on part of themselves to evade responsibility on the bonds; *third*, because complainants do not allege or pretend that the railroad company has failed to keep its contract; *fourth*, because the allegation on which the decree is asked to relieve the town of Milan from payment of its bonds rest on the misconduct and irregularities of its corporate authorities, and the corporation cannot take advantage of its own wrong.

"Defendants, therefore, pray judgment whether they should any other or further answer make to complainants' bill.

M. BROWN, Solicitor for Defendant.

"And the following is the final decree thereon:

"A. Jordan, W. I. House, J. Q. Boyd, M. L. Baird, W. Y. Williamson, S. F. Rankin et als., Mayor and Aldermen of the town of Milan, vs. The Mississippi Central Railroad Company, H. S. McComb, and James Hall.

"Be it remembered that this cause, this ninth of January, 1875, came on to be heard and was heard before Hon. John Somers, chancellor, etc., and it appearing that this suit had been settled by the following agreement, to-wit:

"Whereas, the board of mayor and aldermen of the town of Milan, in Gibson county, Tennessee, have filed a bill in the chancery court at Humboldt, against the Mississippi Central Railroad Company, to enjoin the collection of certain bonds issued by the town of Milan to aid in the construction of said road, to-wit, twelve bonds of \$1,000 each, with coupons attached, and said suit is now pending in said court; and whereas, it is agreed by and between said corporation of the town of Milan and the New Orleans, St. Louis & Chicago Railroad Company, into which said Mississippi Central Railroad Company has been merged by contract of consolidation between said last-named company and the New Orleans, Jackson & Great Northern Railroad Company, that said suit be compromised as follows, to-wit: The said New Orleans, St. Louis & Chicago Railroad Company is to issue to the town of Milan certificates of stock in the sum of \$500 each, dollar for dollar for the said bonds, and the said town of Milan on their part agrees, on receipt of said stock, to let a decree be entered in said cause in favor of the validity of said bonds, which are to be redelivered with the seal of the town affixed, and the cost of said suit to be paid by said New Orleans, St. Louis & Chicago Railroad Company.

"In testimony whereof, we herewith sign our names and affix our official seal, this December 18, 1874.

A. JORDAN, Mayor.

"A. M. WEST,

"Second Vice-President N. O., St. Louis & C. R. Co.

"In pursuance of this agreement, and by consent of the parties, it is ordered, adjudged, and decreed that the New Orleans, St. Louis and Chicago R. R. Co. shall issue to the town of Milan certificates of stock in said company in sums of \$500 each, dollar for dollar, for said twelve bonds of \$1,000 each, referred to in the bill; and it is further ordered, adjudged, and decreed that, on the presentation of these certificates of stock, the town of Milan shall have the corporate seal of said town affixed to each of said twelve bonds, and delivered to H. S. McComb, to whom they rightfully belong, or his authorized agent, and said bonds and coupons attached are declared to be valid and binding on said town and its authorities. It is, by consent, further ordered, adjudged, and decreed that the injunction be dissolved; the demurrer herein filed be and the same is hereby overruled; and this decree is declared a final settlement of the right of the parties. The New Orleans, St. Louis and Chicago Railroad Company to pay the costs, and this case only retained on the docket so far as is necessary to enforce the final execution of this decree."

Sixth. It is further agreed that the plaintiffs may file and read the affidavit of S. F. Rankin, R. F. Harris, or other residents of said town, and that the defendant may file and read the affidavits of E. A. Collins, S. H. Hale, and David Taylor; such affidavits to relate to the question of the population of said town in 1873, and to be considered as evidence herein.

It is further agreed that, upon the consideration of this motion for a new trial, the defendant shall not be prejudiced by the default herein taken, but the court will consider the case as now on trial on its merits, and render judgment accordingly; and, on any appeal taken, this shall be the bill of exceptions, with other parts of the record. That the records of said town were destroyed by fire in 1879, and no census, authorized by law, of the town was

taken before 1880, when the population was ascertained to be 1,600. That in another suit by other parties against said defendant, not affecting the issue herein, it was proven by A. Jordan, the then mayor of said town, as follows: *Question.* "State if, at the election on said proposition, three-fourths of the qualified voters of said town voted in favor of subscribing the bonds, as compared with the gubernatorial election next preceding the same; and if you know how many votes were so polled in favor of said proposition, and how many against, please state it." *Answer.* "I don't know; my recollection is that there were 60 for it, and three votes against it. The voting population was about 250." This was in reference to another proposed subscription by said town to the Tennessee Central Railroad Company, which has been declared invalid by the Tennessee supreme court.

It is further agreed that said railroad was not completed to said town until after July, 1873.

Seventh. That after said final decree in said chancery court the plaintiffs became the owners of said bonds, with the coupons attached, purchasing some for value and before due. Said copy of bill in Humboldt chancery, affidavits, and briefs of counsel will be filed with Hon. E. S. Hammond, judge, etc., on or before fifteenth of December, 1883, and the cause be then submitted upon this record. That in the proposition submitted to the voters in defendant town the question of subscribing \$12,000 to the stock of said railroad company, payable in said bonds, was also submitted in one question, and at one and the same time, and was so approved by the requisite majority.

It is agreed that the original agreement under which said chancery decree was rendered is not on the file and has been lost.

HOLMES CUMMINS, Attorney for Plaintiffs.

SP'L HILL, Attorneys for Defendants.

The statutes of Tennessee relied upon to support the bonds are the following:

CODE OF TENNESSEE.

1142. Any county, incorporated town, or city may subscribe for stock to an amount not exceeding in the aggregate one-fifteenth (amended to one-tenth) of its taxable property, nor more than one million dollars, in railroads running to, or contiguous thereto, upon the following terms and conditions:

1143. The approbation of the legal voters of the county, town, or city, to the proposed subscription, must first be obtained by election held by the sheriff in the usual way in which popular elections are held.

1144. The election may be ordered by the county court or corporate authorities of the town or city, upon the application in writing of the commissioners appointed to open the subscription books for the stock of such road, or of the board of directors, if the company is organized.

1145. Before such application can be made, the entire line of the road, in which the stock is proposed to be taken, shall be surveyed by a competent engineer, and substantially located by designating the *termini*, and approximating the general direction of the road, and an estimate of the grading, embankment, and masonry made by the engineer, under oath, and filed with the application.

1146. The election shall be advertised at least 30 days beforehand, by notices posted up at the different places of voting, specifying the time when it is to be held, for what road, the amount of stock proposed to be taken, and when payable.

1147. At the election thus held, those voters who are in favor of the subscription will put on their tickets the words "for subscription;" those opposed, "no subscription."

1148. If a majority of the legal voters of the county, town, or city, as the case may be, estimating the vote by the last preceding governor's election,

should be in favor of the subscription, the judge or chairman of the county court, or the mayor of the corporation, shall subscribe the amount of stock so voted for, in the name of the county or corporation.

1148a. That section 1148 of the Code be so amended as to read as follows, to-wit: If the majority of the votes cast of a county, town, or city, as the case may be, should be in favor of the subscription, the judge or chairman of the county court, or president of the board of county commissioners, or the mayor of the corporation, shall subscribe the amount of stock so voted for in the name of the county or corporation.

1148b. Should any county, town, or city fail to vote the subscription to any railroad company at any election held for the purpose, said county, town, or city may, at any time after thirty days, order another election, if desired by the railroad company; such election to be held by the commissioners of registration, as now provided by law.

1149. The money raised under the provisions of this article shall be expended within the county in which such stock is taken, or as near thereto as practicable.

1150. As soon as the stock is subscribed, it is the duty of the county court, or corporate authorities, to levy a tax upon the taxable property, privileges, and persons, liable by law to taxation within the county or corporation limits, sufficient to meet the installments of subscription as made, and the cost and expenses of collection, which tax shall be levied and collected like other taxes.

1151. The revenue collector, or any other person, may be appointed by the county or other corporate authorities to collect the railroad tax, who shall first give bond with good security, in double the amount of the installment proposed to be raised, payable to the state, and conditioned to discharge the duties of the office, and faithfully to collect, and pay over to the railroad company such railroad tax, upon which bond the parties are liable as in other official bonds.

1151a. The different railroad tax collectors shall have the power and authority to appoint deputies, not exceeding two, said deputies to have the same powers to collect the railroad tax as the collector himself.

1151b. The provisions of this act are intended to embrace railroad tax collectors who have gone out of office as well as those now in office.

1152. The clerk of the county court, or the proper officer of the corporation, shall make out duplicate lists of the railroad tax, showing the amount of tax each individual is to pay, estimated in conformity to the last valuation of the taxables, and in the proper proportion, one of which lists shall be delivered to the railroad tax collector, and the other retained by him and recorded in his office. He shall also make out and deliver to the railroad company an aggregate statement of such taxes.

1153. He will ascertain the tax on privileges, when necessary, by summoning before him the persons exercising the privileges, at the end of twelve months from the levy of the tax, and taking their statements on oath.

1154. Not more than thirty-three and one-third per cent. of the stock subscribed as above can be collected in any one year.

1155. The tax collector, as fast as he makes collections, shall pay the amounts over to the company.

1156. He shall also, as he receives the tax, give to each tax-payer a certificate in such form as the railroad company may prescribe, showing the amount of such tax paid by him, of which he shall retain a duplicate, to be delivered to the president of the railroad company, and such certificate is negotiable by delivery or assignment, and, with a deduction of its proportion of the cost of collection, is receivable in payment of either freight or passage on the railroad in which the subscription is taken, after the expiration of one year from the completion of such road.

1157. The holder of such certificates to the amount of one share or more of the stock of such railroad company is entitled to demand and receive from the company, in lieu thereof, a certificate of stock in the capital stock of such company, which will give him all the privileges of any other stockholder.

1158. The trustee of the county or recorder of the corporation subscribing stock shall settle annually with the railroad tax collector.

1159. On any default of the collector to settle or pay over railroad tax, as required, he shall be liable to the same proceedings provided for failures to pay over state or county revenue at the suit of the company.

1160. For the purpose of meeting unexpected contingencies, the county or corporation authorities may anticipate the collection of the railroad tax by the issuance of warrants, bearing six per cent. interest, and payable at such times as may be desired by the railroad company, the warrants to be received as payment of so much stock.

1161. In such a case a sufficiency of the railroad tax shall be paid into the county treasury to meet the warrants as they fall due.

1162. The county or corporation may appoint a proxy, from time to time, to represent the stock so subscribed in all meetings of the stockholders.

1163. The circuit court is authorized to issue a writ of *mandamus* to compel the county court, or the corporate authorities of a town or city, to carry into effect the provisions of this article, by ordering an election, subscribing stock or levying a tax, or other act, as the case may be.

1164. The county court or corporate authorities will fix the fees of the collector of the railroad tax and of the trustee, and allow the clerk or recorder such fees as are allowed them for similar services in regard to county and corporation taxes.

1164a. That collectors of railroad taxes be allowed the same fees that are now allowed to collectors of the state and county taxes for similar services. This act to have effect from and after its passage.

1165. The county court of any county having stock in any railroad may sell the same, by the consent of the people of the county, signified in the manner prescribed for authorizing county subscriptions.

Chapter 50, Acts 1870-71.

An act to enforce article 2, section 29, of the constitution, to authorize the several counties and incorporated towns in this state to impose taxes for county and incorporation purposes.

Section 1. Be it enacted by the general assembly of the state of Tennessee, that the several counties and incorporated towns in this state may, and are hereby authorized to, impose taxes for county and corporation purposes, respectively, in the following manner and upon the following conditions: (1) That all taxable property shall be taxed according to its value, upon the principles established in regard to state taxation. (2) The credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except, first, upon the consent of a majority of the justices of the peace of the county, at a quarterly term of the county court of such county, or a majority of the board of mayor and aldermen, as the case may be, of such city or town, and upon an election afterwards held by the qualified voters of said county, city, or town, and the assent of three-fourths of the votes cast at said election. The said county court or board of mayor and aldermen, as the case may be, shall spread upon their records the proposition and the amount to be voted upon by the people, and shall have full power to hold and conduct such elections according to the laws regulating elections in this state; and if the assent of three-fourths of the voters of such county, city, or town is had, then the county court or board of mayor and aldermen, as the case may be, shall have full power to make and execute all necessary orders, bonds, and payments, in order to carry out such loan or

credit voted for as prescribed in this act; nor shall any county, city, or town become a stockholder with others in any company, association, or corporation, except upon a like election, and the assent of a like majority, as prescribed in this act.

Passed January 23, 1871.

Chapter 20, Acts 1872.

An act to authorize the mayor and city council, or mayor and board of aldermen, of any incorporated city or town in the state of Tennessee, having a population of from one thousand and upwards to twenty thousand inhabitants, to issue bonds of said city or town to the amount of \$15,000.

Section 1. Be it enacted by the general assembly of the state of Tennessee, that the mayor and city council, or the board of mayor and aldermen, of any incorporated city or town in the state of Tennessee, having a population of from one thousand to twenty thousand, are hereby authorized in their corporate capacity to issue the bonds of the said city or town, signed by the mayor, and countersigned by the recorder of said city or town, with coupons for interest attached, to an amount not exceeding fifteen thousand dollars. The bonds herein provided for may be executed of denominations from twenty-five to five hundred dollars, at direction of said mayor and city council, or mayor and aldermen, and to mature at such times as may be fixed by said mayor and city council, or mayor and aldermen, from one to twenty years after date, and bearing interest at the rate of eight per cent. per annum, payable semi-annually, the past-due coupons on which bonds shall be receivable for taxes, and all other dues to the corporation issuing the same: Provided, that the bonds issued under the provisions of this act shall be alone for the purpose of paying outstanding liabilities against the city or corporation issuing them; and shall not in any case exceed the unsettled and matured liabilities or debts of such city or corporation at the time of issuance thereof; but in no event shall the bonds be issued without the consent of three-fourths of the qualified voters voting at an election to be held for that purpose under the supervision of said mayor and city council or board of aldermen.

Sec. 2. Be it further enacted, that the said mayor and city council, or mayor and aldermen, of said city or town are hereby authorized to issue at par such coupon bonds as are provided for in this act, to the holders of *bona fide* claims against said city or town, in liquidation and discharge of such claims and interest thereon, and to such others as are willing to take them at par, not to exceed in amount said sum of fifteen thousand dollars, provided that such bonds shall not be sold for less than par, and that the interest rate shall be stated in the submission to the popular vote: Provided, that in no case shall said mayor and city council, or mayor and aldermen, of said city or town, as the agent for that purpose, sell under the par value any of these bonds, the issuance of which is authorized by this act: Provided, further, that the proposed rate of interest the bonds are to bear shall be specified, and submitted to the vote of the inhabitants of such corporations, at the time the election is held in regard to the issuance of the bonds.

Passed March 18, 1872.

Holmes Cummins, for plaintiffs.

Sp'l Hill and Gantt & Patterson, for defendant.

Before MATTHEWS, Justice, and HAMMOND, J.

HAMMOND, J. When this case was first heard there had been a judgment by default against the defendant, and on motion to set it aside the parties stipulated that, on the agreed state of facts, the court should determine the whole controversy, and render judgment accord-

ing to the facts and law of the case. There were no pleadings whatever except the declaration, and this anomalous condition of the record rendered it quite impossible to do what the parties wished, since there were no issues to which to apply the facts; and the rights of the parties might largely depend on the issues to be made by pleadings. Hence the default was set aside and the parties directed to plead. This having been done, the case is again heard upon a stipulation as to the facts and by the court without a jury. But this stipulation, as it appears in the record, may not be broad enough to meet the requirements of the statute, for nowhere does it in terms say that a jury is waived. Rev. St. § 649. The parties are directed, therefore, before judgment is entered, to amend the stipulation or to file an additional one waiving a jury as required by this section.

This court had occasion, in the case of *Green v. Dyersburg*, 2 Flip-pin, 477, to consider very carefully the power of municipalities in Tennessee to issue bonds like these, under the general statutes relied on here, or any power to be implied from them or from the general municipal authority of corporations, and concluded such power does not exist. We think that decision is fully sustained by the supreme court of the United States and of the state of Tennessee. *Claiborne Co. v. Brooks*, 111 U. S. 400; S. C. 4 Sup. Ct. Rep. 489; *Wells v. Supervisors*, 102 U. S. 625; *Pulaski v. Gilmore*, MS. (Nashville, 1880.) It is true that in this last case the court reserved any decision as to what the legislature intended by reference to the "execution of all necessary orders, bonds, and payments, in order to carry out a loan or credit," in the act of January 23, 1871, c. 50, (Tenn. Code, § 491a;) but it is none the less true that it did distinctly decide that "there is nothing in this act that can possibly be construed, on any fair principle of construction, to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company," as authorized by the act of January 22, 1852, c. 117, (Tenn. Code, §§ 1142-1165.) And it seems to us clear enough that the purpose of the act of 1871 was to conform the laws of Tennessee, general and special, to the new constitution of 1870, by authorizing all municipalities already in possession of a legislative authority to give or lend its credit in aid of any person, company, association, or corporation, or which might thereafter become possessed of such legislative grant, to take the consent of the corporate authorities and of the qualified voters, as required by the constitution, and thereafter "to make and execute all necessary orders, bonds, and payments, in order to carry out such loan or credit voted for as prescribed by this act," but *authorized* and prescribed by some other act passed for that purpose. It was not an act to authorize all counties, cities, or towns to give or lend their credit, and "execute all necessary orders, bonds, and payments in order to carry out such loan or credit," but simply one directing all counties, cities, or towns invested with that authority to take a vote of the people and comply

with the constitution. It was an act of regulation, and not one for the creation, of municipal powers. Without the aid of the well-established rule of strict construction of all acts granting this municipal power to issue bonds in aid of auxiliary enterprises, the act of 1871 presents no difficulty, except in the somewhat too general indication of its purpose; with that aid all difficulties vanish.

It affords no argument against this construction of our legislation if the fact be true, as suggested by counsel, which we do not concede, however, that it has never been the habit of the Tennessee legislature to authorize a gift or loan of credit by corporations in any other manner than by becoming stockholders in the enterprise. This act of 1871 was a general law to enforce a constitutional provision, and in its nature was rather prospective than retrospective, and *non constat* that some act may not be passed which would authorize such a method of aiding corporate enterprises. Under some circumstances the act of 1871 might apply to such an authority already given by the legislature, if any such there be; but under all circumstances it does apply to all future grants of power of that kind, and we are not aided in the construction of the act by any inquiry whether such a grant has ever been made or will be hereafter made by the legislature.

On the other hand, as is well known to those informed as to our Tennessee legislation, although we have long had a system of municipal aid to railroads by stock subscriptions, the payment of which is particularly regulated by statute (Tenn. Code, §§ 1142-1165) in a manner which in no sense contemplates the issue of bonds, the parties interested have been allowed in numerous instances, like that of *Tipton Co. v. Locomotive Works*, 103 U. S. 523, to anticipate the benefits of those subscriptions by issuing bonds in payment thereof. But this has always been done by special laws that, providing for the particular scheme adopted, regulate in detail the character of the bonds to be issued, which is on plain business principles necessary for the protection and benefit of all concerned. The absence of such special legislation is, under the circumstances, an indication of the legislative will that a given municipality shall be governed by the general law of the Code regulating its subscriptions.

Since the constitution of 1870 no such special law is allowable, and the authority can be given only by general statute. Const. 1870, art. 11, § 8; art. 2, § 29. But for like prudential considerations based on correct business principles, as well as a sound public policy for the protection of the general welfare, it is presumable that if the legislature intended by any general law to authorize stock subscriptions to be anticipated by the issue of bonds, thereby changing the established system provided for in the Code, (sections 1142-1165,) it would in that general law carefully prescribe, as it has always done in the special laws, having that purpose in view, the character of bonds to be issued, regulate the whole scheme with regard to its

details, and not leave the people who are to pay the money by taxation to the prey of speculators and corruptionists, who may, and too often do, feed upon such enterprises, guard them as carefully as we may. Particularly would this be expected of a legislature meeting under a constitution which had curtailed its powers for this very reason of improvident legislation, as was done by the constitution of 1870. Yet all prudential features of this kind are omitted from the act of 1871, which we are asked to construe as giving to the municipal corporations of Tennessee the most unbridled power to issue bonds in payment of their stock subscriptions that are otherwise so carefully guarded by the Code. We cannot do it.

Again, the constitution of Tennessee, in the very phraseology of article 2, § 29, recognizes the distinction referred to by counsel here between a credit "given or loaned to or in aid of any person," etc., and becoming "a stockholder with others in any company," etc., by taking pains to impose the same restrictions on each in separate clauses. They are in no way treated as the same thing; are not confused with each other nor joined together in any way; certainly not in the way the argument here would connect them, by relegating a stock subscription, with bonds to pay the subscription money, to the category of "giving or lending credit." And the act of 1871, c. 50, follows the same treatment found in the constitution by keeping these two things entirely distinct. The first clause of the second subdivision of the act relates wholly to the "giving or lending of credit;" and in this clause alone do we find the words so much relied on here as giving "full power to make and execute all necessary orders, bonds, payments," etc. It is in the second and last clause of that subdivision that we find the provision independently made for becoming a stockholder with others "upon a like election and assent of a like majority, as prescribed by this act," and in that clause there is no provision for making and executing "all necessary orders, bonds, payments," etc., though it can hardly be doubted that such power would exist where the corporation had authority under some legislative grant to issue bonds or make orders or payments for its stock subscriptions. This shows that it is an act of supplemental regulation directing an election in cases where before, and but for the constitution and this act, such an election was not required. We do not say that a power to issue bonds in payment of a stock subscription might not fall or be made to fall within a power "to give or lend credit to or in aid of any person, company," etc., but we do say that the constitution and this act of the legislature treat the giving or lending of credit as one thing and a stock subscription as another thing, and that naturally in such a division, if kept up as it seems here to have been done, the issuing of bonds to pay a stock-subscription would fall within the latter subject, and should receive no aid by implication or construction from provisions of the statute relating to the former. It is agreed everywhere that the canons of strict construction in such cases

forbid such liberal implications. It is only necessary implications that are ever indulged in any case; necessary in the sense of being the consequential effect of the use of the language employed, and without which implication the manifest purpose of the statute would fail. This kind of necessity is too often confounded with the necessitous circumstances of the private interests of the parties involved, which can in no sense influence a court in the interpretation of the legislative will. *Dill. Mun. Corp.* §§ 55, 81-90, 106. *Police Jury v. Britton*, 15 Wall. 566; *Wells v. Supervisors*, 102 U. S. 625; *Claiborne Co. v. Brooks*, 111 U. S. 400; S. C. 4 Sup. Ct. Rep. 489; *Milan v. Railroad*, 11 Lea, 329, 334.

Legislative authority to support these bonds is sought to be derived from the act of March 18, 1872, c. 20, p. 44, "to authorize the mayor and board of aldermen of any incorporated city or town in the state of Tennessee, having a population of from one thousand and upwards to twenty thousand inhabitants, to issue bonds of said city or town to the amount of \$15,000." The bonds here sued on are in denominations of \$1,000, and bear 7 per cent. interest, payable annually; while those authorized by the act were to be "of denominations from twenty-five to five hundred dollars," and were to bear 8 per cent. interest, payable semi-annually. It was held in *Milan v. Railroad*, 11 Lea, 329, that this variation of denomination was not admissible, and that the interest could not be increased. A similar ruling was made in *Green v. Dyersburg*, 2 Flippin, 477; Whether the mere change of denomination and a diminution of the interest would fall within the principle of these cases, or be held to be "a beneficial modification of the requirements of the statute,"—the fact of this non-compliance with the statute in the issue of these bonds affords an inference that they were not in fact issued under this statute, and that the resort to it is an after thought.

The act, as a whole and in its special features, seems to have contemplated a means of paying the ordinary corporate debts of the cities and towns designated, and not such extraordinary liabilities as arise from aiding the construction of railroads. The bonds issued were to be "alone for the purpose of paying outstanding liabilities," and were not in any case "to exceed the unsettled and matured liabilities or debts of such city or corporation at the time of issuing thereof." There is nothing in this record to show that at the date of these bonds there was outstanding against the town of Milan the sum of \$12,000 of "unsettled and matured" liability for stock subscriptions to the railroad company. The recitals of the bonds state the consideration to be "the location of the Mississippi Central Railroad by said town," and they nowhere refer to any stock subscription whatever, or that they are in payment of the stock. On their face they indicate a direct vote of the bonds to the company without any consideration other than the location of the road. In the bill filed in the state chancery court, wherein the minutes of the town proceedings

are set out, there is no indication of a prior stock subscription, and complaint is made that there was none; and the first step seems to have been a vote by the board to issue the bonds, and to direct an election at the polls "for a ratification or rejection of said proposition," and at the next meeting the entry is:

"The election was held on the twelfth day of June, 1872, for the ratification or rejection of the action of the board of mayor and aldermen of the town of Milan in regard to the issuance of the \$12,000 in bonds to the Mississippi Central Railroad Company upon certain conditions. The returns of said election show a vote of 117 for subscription, and 2, no subscription."

Now, there do not here appear to have been any proceedings for a subscription of stock and an issue of bonds to pay it, but only a "subscription" of the bonds themselves. This would seem to indicate that the town was proceeding to give its credit or sell its bonds for the sole consideration of the location of the road, and this under the first scheme mentioned in the constitution and act of 1871, and not the second, the difference between which has been heretofore adverted to; and, so far as the records of the town are said to show, this is all that was ever done, though when we come to the compromise decree in the state court, the railroad *agrees* to issue its stock in payment of the bonds, this being the first time we hear of any stock being involved in the negotiations between the parties. Nevertheless, the parties, by their stipulation in this case, have agreed that the "bonds were issued by defendant in payment of a stock subscription made by defendant on the ——— day of ———, 187—, to the Mississippi Central Railroad Company." This is very indefinite, indeed, and there is nothing to show the date or other particulars of the subscription, nor whether it refers to the subscription made in the consent decree of the state court, or one made prior to the original action of the board as above set forth.

If we turn, however, to the Code of Tennessee, (sections 1142-1165,) under which alone the town could make a stock subscription, we find that the requirements of law, as therein declared, show that, if the record of the town correctly state all that was done, there could never be a more reckless disregard of those provisions. And the inference is almost irresistible that the town was not proceeding under the provisions of the Code at all. It would seem, therefore, quite impossible that the very indefinite stipulation of the parties in this case could refer to such a subscription, and that it rather refers to the subscription made by the consent decree in the state court, from which it will be seen that the bonds were, by agreement, "re-sealed" and "redelivered" at that date, viz., December 18, 1874. This would be, then, the date which should be filled in the blanks of the stipulation of the parties, as filed in this court. When so filled up, it is apparent that the town was not acting under the above-cited provisions of the Code, and that the plaintiffs can receive no aid from those provisions, but must stand by the contract as they made

it on December 18, 1874. The inevitable result would be that the town, in making *that* contract for stock subscription, was acting without legislative authority, and the debt for it was void. Wherefore, it could not, even under the powers granted by the act of 1872, lawfully issue bonds to pay it; since the act in terms, by section 2, restrained the issuance to holders of *bona fide* claims against the town, to say nothing of any other restriction of law on the subject.

But if it be conceded that the stipulation refers to some other stock subscription than that of December 18, 1874, as above mentioned, and one made prior and as preliminary to the original delivery of the bonds on July 1, 1873,—as, perhaps, the seventh section in its last clause intends to agree was the case,—that the town proceeded strictly under the Code in making that subscription, and under the act of 1872 in issuing the bonds, still it appears conclusively by section 1154 of the Code that “not more than thirty-three and one-third per cent. of the stock subscribed as above can be collected in any one year,” and at most only one-third of the \$12,000 subscription could have been at the date of the bonds an “unsettled and *matured* liability or debt.” What is to be held to be the effect of this overissue we will not now inquire, for beyond all this there is a more fatal objection to the claim of power under the act of 1872, and we have taken the pains to point out these irregularities and glaring departures from the Code and the act of 1872 more to show how regardless this transaction was of the very statutes now relied on to support it, than to predicate our judgment upon them. And here we may remark, in reply to the argument that the town has received the consideration in its railroad facilities, that if its stock subscription be valid under the Code the remedy of the plaintiffs would be to proceed under the Code, to compel the collection of the tax to pay for the stock, and not to enforce bonds issued without legislative authority. No matter what the benefits received, all parties dealing with the town knew that it could not bind itself without legislative authority, and only in the manner so allowed.

The agreed statement of facts in this case leaves only one question of fact open for our determination, and that is whether the town of Milan had, at the time of the issue, the requisite “one thousand or more inhabitants” to bring it within this act of 1872. The learned counsel for plaintiffs frankly admits in his brief “that if we are to look to the proof in the record on that point, defendant’s population is proven to have been under that limit,” and we find the fact to be so. This would end all claim for power to issue these bonds under that statute, but it is insisted that defendant is estopped by the recitals in the bonds from denying that its population was sufficient to authorize the town to issue them. The bonds do not recite that the town had any given number of inhabitants, but only that they are issued “in pursuance of the laws of Tennessee;” that the people “voted the same by a majority, and in the form required by law, the

vote being in pursuance of due notice, and in all respects in accordance with the laws of Tennessee;" and that the board acted "in pursuance of the authority given by the people thereof, and in obedience to the duty required of them."

Under the well-established rules of decision on this subject these recitals are all sufficient to estop the town, as against a *bona fide* holder for value, from denying the fact of the sufficiency of population, and would be a plenary municipal decision of that fact if the town authorities were vested with power to decide the question. *Wilson v. Salamanca*, 99 U. S. 499; *Coloma v. Eaves*, 92 U. S. 484; *Marcy v. Oswego*, Id. 637; *Buchanan v. Litchfield*, 102 U. S. 278. There are many other cases to which these will be a guide. But the cases are carefully reviewed in the recent one of *Northern Nat. Bank v. Trustees Porter Tp.* 110 U. S. 608, (S. C. 4 Sup. Ct. Rep. 254,) and the rule is there laid down that this estoppel only operates when the duty of ascertaining the fact has been devolved by law upon the municipal or other authority which undertakes to determine it by the recital. The authority may be conferred by special legislation in the act authorizing the bonds, or elsewhere, or may grow out of the ordinary duties imposed by law upon the particular officers or agents. Now, there is not one word in this act of 1872 imposing the duty of ascertaining the population on the board of mayor and aldermen of the towns and cities referred to in the act, nor any provisions from which such a duty on their part may be fairly inferred. The "consent of three-fourths of the qualified voters voting at an election to be held for that purpose, under the supervision of said mayor and aldermen," is provided for, but this does not by any fair implication confer the power to take a census of the inhabitants. There is no general or special act of the legislature requiring these or any officers of our municipalities or of the state to take a census, or keep a record of any enumeration of their respective inhabitants. Generally, when our acts refer to population, and direct its ascertainment, they refer in terms to the federal census as the guide, and we have no law or practice of having municipalities discharge this duty. To do this is not a necessary duty growing out of general municipal power. Each municipality may act as it pleases in this regard. There was, then, no duty devolved on this board to ascertain or determine the fact of population, and their determination of it cannot be implied from the recitals in the bonds. It was a matter *in pais*, as much open to the payee of the bonds at the time of the contract, and since to the holders of them, as to others to decide for themselves. There is no pretense of any authority in the charter of the town or of the railroad company, or in any other act than those already considered, to support these bonds, and they were and are utterly void for want of legislative power. *Ottawa v. Carey*, 108 U. S. 110; S. C. 2 Sup. Ct. Rep. 361; *Lewis v. Shreveport*, Id. 282; S. C. 2 Sup. Ct. Rep. 634.

The next question which demands our attention is that arising out of the proceeding in the state chancery court which is pleaded as *res adjudicata*. If this be a good plea, we have the anomaly of a municipal corporation issuing bonds without legislative authority making those bonds valid, by an equally void agreement of its agents that they shall be so. We held in this court, the same judges sitting as in this case, in *Norton v. Shelby Co.*, (not reported,) that bonds issued by usurping corporate officials which were void could not, for want of compliance with the constitutional and statutory prerequisite of an election by the people, be ratified by the corporate action of the rightful officials after their restoration, a ruling which was supported by decisions of the supreme court before and since. *Marsh v. Fulton Co.* 10 Wall. 677; *Lewis v. Shreveport*, 108 U. S. 282; S. C. 2 Sup. Ct. Rep. 634; *Ottawa v. Cary*, Id. 110; S. C. 2 Sup. Ct. Rep. 361. It was said by the supreme court, in *Northern Nat. Bank v. Trustees Porter Tp.* 110 U. S. 608, S. C. 4 Sup. Ct. Rep. 254, speaking of an estoppel by recitals, that it did not go to the extent of precluding an inquiry into legislative authority to issue the bonds; and it certainly must be said of any contract of ratification, that, when pleaded as an estoppel *qua* contract, it cannot prevent an inquiry into legislative authority to issue the bonds. Does it receive any additional force when the contract of ratification has been made the basis of a judicial decree which in terms declares the bonds to be valid *only because the parties have agreed that they shall be valid*? It must be admitted that when in a court of competent jurisdiction, and without collusion or fraud, there has been a decree *in invitum* pronouncing, directly or by implication from the adjudication, that there was legislative authority to issue the bonds, that decree estops the parties from thereafter denying the authority. And we may go further and, for the argument, admit that if that decree be pronounced upon an agreed statement of facts, like that upon which we are now deciding this case, for example, the estoppel is equally as effective as if the facts were determined by the formal verdict of a jury or the judgment of a court upon the proof heard at the trial.

Judgments could not be so rendered at common law, where the admission must be strictly one of record, as by demurrer, default, confession, *retraxit*, or the like. Hence the necessity of such statutes as we have in Tennessee, permitting the parties to submit an agreed case to the decision of a court. Tenn. Code, §§ 3450, 3454, 4229, 4497. And, in the absence of a statute, such practice has been established by general usage. *Derby v. Jaques*, 1 Cliff. 425. From a judgment of this kind it was at first thought there could be no writ of error, but it was later decided otherwise. Id.; *Stimpson v. Railroad*, 10 How 329. Similarly, in a court of equity, it was always the rule that parties by themselves, or counsel, might agree upon a decree, and it was irreversible, and could not be appealed. 2 Daniell, Ch. Pr. (1st Ed.) 616-619, 668; Id. (5th Ed.) 973, 1453, and notes;

Bradish v. Gee, 1 Amb. 229; *French v. Shotwell*, 5 Johns. Ch. 555; *Ketchum v. Farmer's Trust Co.* 4 McLean, 2; *Musgrove v. Lusk*, 2 Tenn. Ch. 576; *Williams v. Neil*, 4 Heisk. 279; *Raysdale v. Gossett*, 2 Lea, 729; *Jones v. McKenna*, 4 Lea, 630.

But, obviously, it does not follow from this binding force of the decree that it can be always pleaded as *res adjudicata*. That depends upon other circumstances than its mere binding effect as a decree in the court where it is rendered. For example, a judgment of nonsuit, or a bill dismissed by plaintiff, or for want of jurisdiction, cannot be pleaded as *res adjudicata*, because not a decision on the merits, while a judgment on demurrer, which is a decision of the court on facts admitted, or a bill dismissed for want of equity, or upon determination of the court in favor of defendant, can be so pleaded. *Homer v. Brown*, 16 How. 354; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121; S. C. 3 Sup. Ct. Rep. 99; *Gould v. Evansville*, 91 U. S. 526; *Durant v. Essex Co.* 7 Wall. 107; *Badger v. Badger*, 1 Cliff. 237; *Mabry v. Churchwell*, 1 Lea, 416; *Bankhead v. Alloway*, 1 Tenn. Ch. 207.

So, in a case like the one we are now trying, again using it as an example, it is plain that the parties have used the agreed statement of facts as a convenient mode of placing the court in possession of the facts, without producing the evidence on which they would be otherwise ascertained; but they have left the decision of the rights of the parties growing out of those facts to the court, and have not by consent of parties determined, by themselves and for themselves, what those rights are. That which they have done is very like what they do when by a demurrer they admit the facts and the court decides the case, or when by a *retraxit* they confess the facts and the court directs a judgment. What they have not done is more like that which they do when they take a nonsuit or voluntarily dismiss their bill.

In the language of the case of the *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 125, S. C. 3 Sup. Ct. Rep. 99, "a trial upon which nothing was determined cannot support a plea of *res adjudicata* or have any weight as evidence at another trial" and, as decided in *Russell v. Place*, 94 U. S. 606, if it appear by the record or *aliunde* that the matter was not litigated and decided, there could be no estoppel. Now, does it not appear, by what the parties actually did in the state chancery court, that this matter was not litigated and not decided? And here lies a distinction that must not be overlooked in cases like this between a consent to submit a case to the court for its decision and a consent as to what the decision shall be. Again, there is a distinction between that estoppel which the parties put upon themselves by their *agreement* which may be pleaded and bind them as an estoppel *in pais*, and that which arises out of the adjudication as an estoppel of *record*. The agreement is none the less an estoppel because it takes the form of a judicial decree, but not necessarily does it operate as an estoppel of record. The pleas re-

spectively setting them up would be essentially different. 2 Daniell, Ch. Pr. (1st Ed.) 175, 187; Id. (5th Ed.) 659, 666. In both, the record would be used as evidence; in one case conclusive in its effect to support the plea of *res adjudicata*; in the other it would not be conclusive, might be averred against, and would be overcome by countervailing proof of sufficient force.

The text writers agree that in England a consent decree cannot be pleaded as *res adjudicata*, and is effective when pleaded only so far as the estoppel arises out of the agreement itself. Bigelow, Estop. 17; Freem. Judgm. § 331; Whart. Ev. § 783. They say, however, that the decisions of the American states, generally, are against this doctrine. Id.; Wells, Res. Adj. §§ 440-460. We have examined very carefully a great many of the cases cited in support of this supposed distinction between the American and English courts, and find that if critical attention is given to the distinctions to which we have already adverted between a case decided by the court upon an admitted state of facts, and one decided by the parties themselves solely by their own consent, which the court admits of record by registering the agreement, and between the estoppel of the agreement and that of the judgment, and to distinctions arising out of local statutes regulating the subject of judgments by confession and agreed cases, it may be doubtful if there be so much divergence between those courts on this subject.

To illustrate: In *Merritt v. Campbell*, 47 Cal. 543, a dismissal by consent under the local statute was held equivalent to a judgment upon *retraxit* at common law, and was a decision on the merits under the act, because, like a *retraxit*, it was "an open and voluntary renunciation of the suit in court." In *Ellis v. Mills*, 28 Tex. 584, it does not appear whether it was the compromise agreement which was a bar as a matter of evidence, or the judgment as a matter of record. In *Fletcher v. Holmes*, 25 Ind. 458, there was an agreement for a judgment not otherwise supported by the complaint, but it was not a plea of *res adjudicata* at all. *Gates v. Preston*, 41 N. Y. 113, is more in point, but there was a divided court. In *Bank v. Hopkins*, 2 Dana, 395, there was in effect a decision on an agreed statement of facts. And so we might go through the cases and distinguish them; but it is not necessary, for we have not found one where a municipal corporation has been held to have validated its bonds, otherwise void, by a consent decree declaring the bonds valid, and showing on its face that it was so decreed solely because the parties had agreed to it.

Individuals *sui juris* may agree to almost anything and bind themselves, but corporations must act within their delegated powers. It is undoubtedly within their power to compromise litigation, and they may, when sued, consent to orders and decrees, and if the subject-matter of the suit be within their authority this consent will bind as it will individuals. As in *Board Liquidation v. Louisville & N. R. Co.* 109 U. S. 221, S. C. 3 Sup. Ct. Rep. 144, it was held that the

city authorities had "under the statutes of the state" the power to compromise a suit relating to certain property belonging to the city, and in *Hillsborough v. Nichols*, 46 N. H. 379, the suit compromised was one for injuries by a defective highway which the authorities had a right to compromise, the subject-matter being within corporate jurisdiction. In this last suit, so much relied on here, and cited by the text writers above named, it is to be noted that there was no plea of *res adjudicata* at all, but it was an action by the town to recover money paid to the plaintiff under the compromise judgment. We cannot say that if the plaintiff in that suit had brought another action for the injuries, the former judgment by consent would have been held to sustain a plea of *res adjudicata*. These compromise judgments may be binding in other respects, but not necessarily for that reason pleadable as *res adjudicata*. Whether they are binding in other respects depends on the circumstances of the case; but whether they are binding on a plea of *res adjudicata* depends on whether the judgment or decree conforms to the rules of law which give it that effect. In *Lamb v. Gatlin*, 2 Dev. & B. Eq. 37, an exception to the report of a master equivalent to the plea of *res adjudicata* failed, because the former decree "was not in truth a decree rendered *in invitum*, and by judgment of the court to which defendant was compelled to submit, and which therefore not only binds him, but those for whose benefit he held the estate, unless it can be impeached for fraud, but it was a voluntary settlement, etc. A decree thus rendered has no force, except so far as seen to be just."

In *Allen v. Richardson*, 9 Rich. Eq. 53, it is said: "A consent decree is the mere agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement." In *Rosse v. Rust*, 4 Johns. Ch. 300, where a bill had been dismissed on a former hearing because no one appeared for the plaintiff, the decree was pleaded as *res adjudicata*, and Chancellor Kent said that to be a bar the merits must be decided, and where the merits were never discussed and no opinion of the court ever expressed upon them, the case does not come within the rule. He was overruled in *Ogsbury v. La Farge*, 2 N. Y. 113, not upon the principle thus enunciated, but in his application of it, and it was held that a bill so dismissed after publication of proof was the same as a decision on the merits, and not like a voluntary dismissal or a nonsuit at law. But it must be admitted that in *French v. Shotwell*, 5 Johns. Ch. 555; S. C. 6 Johns. Ch. 235; S. C. 20 Johns. 668, that learned chancellor does decide that a decree by consent dismissing the bill may be pleaded in bar to another bill for the same relief, though, in that case, the agreement itself was likewise pleaded as an estoppel, and, without the decree, would have been just as effectual as with it; for, if the plaintiff had not dismissed the bill according to the agreement, the defendant, by proper pleading, even in that suit, might have called upon the court to dismiss it. In fact, the agreement settled the merits of the controversy, the par-

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ties being competent to agree; and the plaintiff, having waived the fraud and expunged the usury, there was nothing to do but dismiss the bill, and all other bills setting up that fraud and usury. All the authorities agree that if the plaintiff had *voluntarily* dismissed his bill he might have brought another suit. He did voluntarily dismiss it, but upon a valid agreement to do so; and from this it would seem that it was the agreement, at last, that worked the estoppel. But the chancellor did not put his judgment on this ground, and the case is a very strong one for the plaintiffs here, unless there be a distinction to be taken on the want of power in the corporate authorities of Milan to make the agreement. The case seems to have been affirmed; but, it is said in *Shufelt v. Shufelt*, 9 Paige, 137, not on that point, though the chancellor there followed it as to a confessed judgment. The cases cited by Chancellor KENT are not all of them cases of pleas of *res adjudicata*, those at page 565 being applications for relief on *sci. fa.*, or direct applications to vacate the judgments, while *Loyd v. Mensell*, 2 P. Wms. 73, and *Wishall v. Short*, 2 Eng. Cas. Abr. 177, were original bills to impeach the judgments for fraud, and it was held that the judgments might, in that kind of suit, be pleaded in defense, if accompanied by an answer denying the fraud. In *Baird v. Berdwell*, 60 Miss. 164, the case establishes that where it is shown by the decree that it was not heard upon its merits, there is no bar to another suit. It was a bill dismissed on motion of defendant for want of prosecution after the case had been set down for final hearing. In *Pelton v. Mott*, 11 Vt. 148, there was an agreement to dismiss on the merits, which being done it was held to be a bar; and *Hicks v. Aylsworth*, 13 R. I. 562, was a similar case. The parties, by their agreement in those cases, intended to provide against the distinction between a voluntary dismissal, or a dismissal for want of prosecution, and an adjudication on the merits. In *Rollins v. Henry*, 84 N. C. 569, 578, the action of the court was more like that in this case than any we have found, except that in that case the decree followed the technical result of the agreement which settled the rights of the parties and formally dismissed the bill, while in this the bill was not technically dismissed, but was retained only so far as necessary to enforce the final execution of the decree. Substantially, the bill was dismissed, as in the North Carolina case, in which it was held that the decree could not be relied on as *res adjudicata* because "it does not appear that the merits of the dismissed proceeding were considered and passed on; and the mere dismissal of the case is not, in our opinion, followed by the consequences supposed." The case cited by the court calls attention to the fact that in equity courts to "dismiss the bill" is the entry, whether the case is heard on the merits and decided for defendants, or otherwise dismissed; while in courts of law the form of the entry shows for itself whether it was a mere discontinuance or a judgment on the merits. *Jenkins v. Johnson*, 4 Jones, Eq. 149. Hence, in courts of equity, we must have

a care to find whether the decree was indeed an adjudication *in invitum* or only the agreement of the parties to act voluntarily.

In Massachusetts the rule seems to be that where issue is joined a decree by consent on that issue is a bar; but where no issue is joined, as where a plea in abatement has been sustained, after which there was a consent judgment, it is no bar. *Powers v. Chelsea Bank*, 129 Mass. 44; *Jordan v. Siefert*, 126 Mass. 25. Now, in the case we have in hand there was never any issue joined. After the demurrer was overruled the plaintiffs had a right to an answer from the defendants, and, failing in this, to a decree *pro confesso*, and ultimately a decree in their favor. Technically, overruling the demurrer was a decision in favor of the bill and an adjudication that the bonds were void; but by agreement of the parties this result was defeated by declaring the bonds valid, dissolving the injunction, and substantially dismissing the bill. There could be no decision on the merits, for there was no issue on the merits. The demurrer may have made an issue, but that was *overruled*, and this was a decision against the plaintiffs, and not in their favor. This is an anomaly in this class of cases, but it would be stretching the doctrine of this estoppel very far to allow the plaintiffs, in the face of an overruled demurrer, to have the benefit of a decree as if their demurrer had been *sustained* upon the issues made by it and thereby deciding the merits. *Gilman v. Rives*, 10 Pet. 298, 301; *Aurora v. West*, 7 Wall. 82, 99; *Gould v. Evansville Railroad*, 91 U. S. 526.

The best that can be said for the plaintiffs, after this demurrer was overruled, is that upon a naked bill, without any issues of any kind or any pleading by defendant, the parties *agreed* to dismiss it, (though the decree does not in fact dismiss it,) upon a stipulation that the facts and law were with the defendants. The declaration by the court that the bonds were valid adds no force to the *decree*, which should have been simply that the bill be dismissed, if the court so decided. All the authorities, as we have shown, agree that such a decree is not a bar unless it be a decision on the merits, and the inquiry is always to see whether it is such a dismissal or one otherwise procured. Here the bill was dismissed after a decision of the only issue in the case made by the demurrer, in favor of the plaintiff, that the bonds were void. Technically, then, it seems the decree cannot be a bar except upon the theory of a purely consent arrangement to dismiss a bill, before answer filed, by an adjudication without issues, shown upon the face of it to be not the judgment of the court, but the judgment of the parties as to their own rights.

In *Jenkins v. Robertson*, H. L. 1 Sc. 117, there was a suit by a town for a right of way for foot passengers. The town had a verdict, but afterwards abandoned it and agreed to a judgment absolving the defendants, and to pay the costs and expenses, and the court so declared. That was a case precisely like this, except that the subject-matter was clearly within the power of the municipality to arrange

Nevertheless, the house of lords held that a decree so procured by consent was not a bar to a new action by the town, and reversed a decree below to the contrary. It was announced in the most emphatic terms that the law of England and Scotland was that a decree so pronounced could not be *res adjudicata* except so far as an estoppel could grow out of the agreement. And in the *Earl of Bandon v. Becher*, 3 Clark & F. 479, 509, the same court approved the statement of the doctrine, as made by the solicitor general in the *Duchess of Kingston's Case*, 20 How. St. Tr. 478, that such decrees may be attacked when so pleaded for collusion or fraud, because there is no *real* prosecution, no *real* defense, and no *real* decision.

In a case like that we are considering, an agreement that would impose, without legislative authority, a tax upon the citizens of the municipality to pay bonds that were void, is itself a fraud, no matter how well intentioned, or how much the parties believed in their power to make it. After the agreement was made, it was a collusive suit and a collusive decree to all intents and purposes, and it is a mistake to suppose that there should have been a corrupt bargain, by which the persons acting for the town profited themselves to invoke this principle of fraud and collusion. Its effects are the same, and it was none the less fraudulent in contemplation of law because the parties got nothing for the wrong, or thought they were doing right. *Enslinger v. Powers*, 108 U. S. 292, 301; S. C. 2 Sup. Ct. Rep. 643. Objection is made that the decree of a *state* court pleaded as an estoppel cannot be attacked in this court for fraud in procuring it. *Christmas v. Russell*, 5 Wall. 290. But this does not apply when the infirmity appears in the record and on the face of the decree itself, as it does here. It is then a question of the character of the judgment itself, in its relation to the conduct of the parties procuring it. It is not attacking the judgment for fraud and collusion, but the presentation by the plaintiffs themselves of a record which recites the collusive arrangement, and makes it *felo de se* as between the parties to it. They had no power to issue bonds, assumed to supply it by contract between themselves, and sought to sanction that assumption by a judicial decree. They might as well without a suit have taken a judicial decree in the form of an act of the legislature, and in lieu of it. Indeed, such a decree is a usurpation of legislative power when it undertakes to declare by mere consent of parties the validity of the bonds. If the legislature had especially invested the courts with power to make such declarations, and thereby make valid bonds that were void by want of legislative authority, it would be unconstitutional as a delegation of legislative power. *Jones v. Perry*, 10 Yerg. 59; *Cooley*, Const. Lim. 87-114, 392.

The supreme court of the United States in *Gaines v. Relf*, 12 How. 472, 537, decides with emphasis that a collusive suit cannot be *res adjudicata*, because there is not a *real* controversy *really* litigated. That was, in principle, a case like this, only the agreement did not

appear on the face of the decree, as it does here. It was throughout a consent judgment, and we regard the case as quite applicable here. So is the case of *Gay v. Parpart*, 106 U. S. 679, S. C. 1 Sup. Ct. Rep. 456, where a decree, that was merely "the judicially recorded supposed agreement" of the parties, was not allowed to stand in the way of doing justice between them. And in *Ensminger v. Powers*, 108 U. S. 292, S. C. 2 Sup. Ct. Rep. 643,—a very remarkable case,—the court denied effect to a plea of *res adjudicata* on a bill of review, because the decree pleaded was not the "deliberate judgment of the court upon the facts in the record," and "the functions of the judge were abdicated," etc. It is a very instructive case.

The most that can be said is that the authorities are conflicting on the question whether purely consent decrees are *res adjudicata*. But, certainly, we should not be asked to give this decree greater effect than it would have in the state courts of Tennessee, where the supreme court, in the case of *Hix v. Gosling*, 1 Lea, 560, has, in terms, adopted the English doctrine. *Rice v. Alley*, 1 Sneed, 52; *Penniman v. Smith*, 5 Lea, 130.

We do not wish to be understood as ruling that a record is not to be taken for all that it implies when pleaded as *res adjudicata*, or that the trial of that plea will require an inquiry into the extent of the litigiousness of the parties, or the quality and quantity of consideration given to the case by the court rendering the decree, or whether its action was based on a formal or informal presentation of the facts and law, but only that the technical character of the judgment must be such that, necessarily, there was an adjudication of the merits by the court, invoked or sustained, it may be, by consent of parties, but none the less an *adjudication*, and not simply a judicial registration of an agreement of the parties. And while a consent decree upon agreement as to the facts and, possibly, as to the law of a case, may, under some circumstances and as to some parties, have all the force, and as effectually estop the parties as would a decree *in invitum*, it is not, in our opinion, competent for the authorities of a town to agree that its void bonds shall be made valid by putting that agreement into the form of a judicial decree, which, on the face of it, shows that it is not the judgment of the court upon the facts and law of a case actually litigated, but merely the record of an agreement of the parties that it shall have that effect; the authorities of the town assuming to act without legislative authority to ratify the bonds in that or any other manner.

It would be a dangerous rule if it were otherwise, and afford opportunities to impose fraudulent bonds upon communities with more facility than could be done under any device hitherto resorted to by those anxious to evade the restrictions of law on that power.

Judgment for defendant.

MATTHEWS, Justice, concurred fully in the reasoning and conclusion of the foregoing opinion.

[NOTE. The manuscript opinion of the supreme court of Tennessee, cited in the foregoing opinion, and printed in the briefs of counsel, is herewith appended, as it is not elsewhere accessible in print:]

OPINION.

Mayor and Aldermen of Pulaski vs. Gilmore & Cherry O'Connor & Co.
(Nashville.)

In 1874 the directors and commissioners of the Memphis & Knoxville Railroad Company petitioned the board of mayor and aldermen of the town of Pulaski for a subscription of \$40,000 to their capital stock, on such terms and limitations as the board might see proper. The question was submitted to a vote of the people and approved by the requisite majority. The proposition involved the idea of issuing bonds having twenty years to run, each of the denomination of \$500, bearing eight per cent. interest; stock to be issued to the corporation equivalent in amount to the bonds thus proposed to be issued. As part of the proposition it was agreed that these bonds of \$500 each were to be issued to pay for the expenses incident to a survey of the line of the road through Giles county. These bonds were issued and came into the hands of the parties plaintiffs in this case before due, and are the basis of the present suit.

We may assume, for the purposes of this opinion, that the proceedings, if not perfectly regular, have nothing in them that can fix any right to urge it against the present holders. They stand as innocent purchasers for value. The only defense that can be made available against the liability sought to be enforced, is a want of authority in the corporation to issue the bonds in question. This is a defense at all times available in such a case, unless it may be the doctrine of estoppel *in pais* may be an exception allowed in certain cases.

The question then is, did the corporation, under the constitution and laws of the state, have the power to issue these bonds? If so, plaintiff was entitled to his recovery on the coupons; if not, defendant should have had a verdict. It is the case of a subscription to the stock of a contemplated railroad. The fact that these particular bonds were to be applied to pay for a specific part of the work necessary in the construction of the road, cannot alter the character of the bond, nor aid in arriving at a solution of the question of power. Whether to be used for this, or any other purpose connected with the construction of the road, the case would be the same. The proposition submitted to the people, and the contract attempted to be made, was simply a subscription for \$40,000 of stock in the corporation, which was expected to build the road, and the bonds of the corporation (these three included) were to be issued in paying for said stock. By our present constitution, which in this respect is the same as that of 1834, § 2, art. 29, the general assembly shall have power to authorize counties and incorporated towns in this state to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law, and all property shall be taxed according to its value upon the principles established in regard to state taxation. By the constitution of 1870 there is added: "But the credit of no county, city or town, shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at such election."

We need not examine, discuss, or decide the question whether the *addenda* gives any additional or different power to the legislature from that conferred in the first clause of the section quoted; that is, to levy taxes for county and corporation purposes, respectively. It suffices that it was decided many years since that a railroad was a county and corporation purpose, and taxes might

be levied under authority from the legislature, to be used in aid of such enterprises. It is not improper to say that while this is all now settled in our state as an original question, the writer of this opinion did not and does not now concur in its correctness. The question, however, is whether, under the statutes existent at this time these bonds were authorized, the power to issue them is given. We need not, as we have said, go into the question of the constitutional power to authorize them. We need scarcely say that in order to the issuance of such bonds there must be an express authority given the city or town, either by a general law of the land, or by a special law for this purpose. No such power can be implied or can be inferred from any of the ordinary powers of such corporations. "No argument," says Judge MCKINNEY, in the case of *Cook v. Sumner Spinning & Manuf'g Co.* 1 Sneed, 714, "can be necessary to show that the authority to purchase stock in a manufacturing company, or to issue bonds for the payment thereof, cannot be derived simply from the power of taxation conferred in a charter." See, also, 9 Heisk. 534.

Taxation and payment of all liabilities directly from this means is the normal work of action by such bodies. Bonds on time are not incident to this, and can only be issued when authority is conferred by law. The old act of 1852, Code, § 1142, and other provisions of that article, is the basis in our general law for such action as may be taken by counties and corporations in subscribing for stock in railroads running to or contiguous to such towns. It is too clear for argument that no such authority is found in these sections. The act of January, 1871, intended to regulate elections, under the constitution, in first section, simply embodies the authority contained in the constitution as to counties and towns levying taxes for county and corporation purposes, prescribing in the subscriptions the conditions and regulations by which the power shall be executed. But there is nothing in this act that can possibly be construed on any fair principle of construction to authorize the issuance of these bonds in payment of a subscription of stock in a railroad company. What was intended by the reference to "execution of all necessary orders, bonds, and payments, in order to carry out" a loan or credit, we need not now determine. See section 2; Code, § 491*a*. It suffices that there is no authority in this act to issue such bonds as are the basis of this suit; the same having been issued without authority of law, are simply void, whether in the hands of innocent purchasers or others.

Reversed, etc.

[Signed]

FREEMAN, J.

BRAMAN v. SNIDER and another.

(Circuit Court, D. Minnesota. October 22, 1884.)

BANKRUPTCY—JUDGMENT OBTAINED ON PROVABLE CLAIM—DISCHARGE.

On August 8, 1873, suit was commenced in New York against S. & G., and judgment by default entered March 29, 1876, for \$3,199.09. S. failed in 1873, and removed to Minnesota in 1875, where he filed his petition in bankruptcy, and was adjudged a bankrupt, July 15, 1876. The schedule filed by him set out the New York judgment. November 23, 1876, he obtained his discharge. On April 6, 1876, the judgment by default in New York, of March 29, 1876, was, on motion of his attorney, set aside, a trial had October 10, 1876, and judgment for \$3,336.25 entered against him, October 14, 1876. There was no communication between S. and his attorney after S. left New York. Held, that the debt or claim in the pending suit in New York was provable, under section 5057 of the United States Revised Statutes, after the adjudication of bankruptcy of July 15, 1876, and, although the judgment was entered before the certificate of discharge was granted, an action on the judgment was barred by the discharge.

In Bankruptcy.

C. A. Congdon, for plaintiff.

J. M. Shaw, for defendants.

NELSON, J. This action is brought upon a judgment obtained in the supreme court of the state of New York against Samuel P. Snider and Willoughby H. Giffney, on October 10, 1876. Defendant Snider answers, and sets up his discharge in bankruptcy as a bar to recovery. I find the following facts:

On August 8, 1873, a suit was commenced by Braman & Boynton, in the supreme court of the state of New York, against the firm of Snider & Giffney, and on failure of the defendants to appear at the trial by the court, a verdict was rendered and judgment entered and filed March 29, 1876, for \$3,199.09. The defendant Snider became insolvent in the fall of 1873, and left the city of New York and became a resident of the state of Minnesota in 1875. In July, 1876, he filed his petition in bankruptcy and was adjudged a bankrupt July 15, 1876. The schedules filed by him set forth a judgment obtained against the firm of which he was a member in March, 1876, by Braman & Boynton, in the city of New York, and stated the amount at about \$3,000. On November 25, 1876, he was discharged and received his certificate. On April 6, 1876, his attorney obtained an order setting aside the judgment entered March 29, 1876; and on October 10, 1876, the case was again tried, and the defendants not appearing, a verdict was rendered and a judgment was entered and filed for the sum of \$3,336.25. There was no communication between Snider and his attorney after he left New York. Boynton assigned his interest in the judgment before this suit was commenced.

CONCLUSION.

If it is conceded that the debtor's attorney in New York had authority to obtain an order setting aside the judgment entered March 29, 1876, I am still of the opinion that the debt or claim in the pending suit in the New York supreme court was provable under section 5067, Rev. St., against the bankrupt's estate after the adjudication, July 15, 1876; and although a judgment was entered before the certificate of discharge was granted, the debt on which the judgment was entered being a provable claim existing at the time of adjudication, is barred by the discharge. The terms of the certificate of discharge, enacted by section 5115, Rev. St., declares that the bankrupt "is discharged from all debts and claims made provable" by the bankrupt law, and "which existed on the day on which the petition for adjudication was filed." The doctrine of merger and extinguishment of the debt, and that the judgment constitutes a new debt from the time of the recovery, is not applicable under the bankrupt act.

Judgment for defendants.

UNITED STATES v. KOCH.¹

(Circuit Court, E. D. Missouri. October 2, 1884.)

1. PENSIONS—CHARGING ILLEGAL FEE—INDICTMENT.

An indictment for charging and collecting an illegal fee for obtaining a pension, need not state how the accused was instrumental, and what he did, in procuring the pension.

2. SAME—MALICE.

It is also unnecessary for it to state that the defendant "willfully and wrongfully," or "unlawfully," did the act charged.

3. SAME—ADMISSIBILITY OF EVIDENCE OF A SHAM SALE.

Where the indictment charges the receipt of a sum in excess of what may be legitimately charged, evidence is admissible to prove that he sold the pensioner property for a sum largely in excess of its value, if supplemented by proof that the sale was a mere trick to obtain an unlawful fee.

4. SAME—PRACTICE—BILL OF EXCEPTIONS.

Where a bill of exceptions states in such a case that a sale to the pensioner for a price largely in excess of the real value of the property sold was proved, and is silent as to whether or not the necessary supplemental evidence was introduced, it will be presumed that it was.

Indictment for Charging and Collecting an Illegal Fee for Obtaining a Pension.

William H. Bliss, for the Government.

D. P. Dyer, for defendant.

BREWER, J. In the case of the United States against Louis F. Koch, tried in the district court and convicted there, a writ of error was taken to this court. The indictment charges that the defendant, having been instrumental in obtaining pensions for certain parties, did thereafter charge and receive more than the fee which is authorized by the statute.

Three substantial questions are presented:

1. The indictment charges that the defendant, having been instrumental in procuring the pension of the party named, etc. It does not say how he was instrumental, or what he did in procuring that pension, and the claim is that this indictment should charge how he was instrumental, and what he did in procuring the pension. This is unnecessary. The *gravamen* of the offense is not that he was instrumental in procuring the pension; that simply describes the person who is within the purview of the statute. In the *Britton Case*, a late supreme court decision, (107 U. S. 669; 2 Sup. Ct. Rep. 512,) the charge was that the defendant, being president of a bank, willfully misapplied the funds of the bank. Now, as has been well said by counsel for the government, whatever criticism might have been made and was made upon the use of the words that he "willfully misapplied," nothing was said, nothing ought to have been said, as to the simple allegation that the defendant was president of the bank; that was a mere *descriptio personæ*. And here the fact that the defendant

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar

was instrumental in procuring the pension is a minor matter: it is simply that which brings the party within the prohibition of the statute. The *gravamen* of the offense is that, having been thus instrumental, he charged and received a fee in excess of that which the statute warrants. And where this matter is simply subordinate,—the mere description of the person,—I think it unnecessary more than to say that the defendant was such a person.

2. It is insisted that the indictment is deficient, in that it fails to charge that the defendant "willfully and knowingly," or "unlawfully," did the act charged. The offense denounced by this section is charging and receiving more than the prescribed fee. Such a transaction is not inherently vicious. In the absence of a statute prohibiting it, any man may contract for his services; he is not bound to render them; and, rendering them, he may charge the person seeking those services such fee as they may agree upon. It is not a matter which is *malum in se*—inherently vicious; it is a matter which is perfectly legitimate and proper, in the absence of the prohibition of the statute. The statute steps in, and, from motives of public policy, says that no fee shall be received in excess of a prescribed amount; and that is like many provisions found in municipal ordinances, regulating the dealings of one man with another, not inherently vicious, but laying down a rule of conduct which every man must conform to at his peril. It is not like a charge of assault and battery, where the act may or may not be wrong. Assault and battery may be perfectly justified in defense of one's property or person, or from other reasons, and therefore it may be necessary, in such a case, to allege that it is illegally or wrongfully committed. But this is a matter where congress has stepped in and says that, under all circumstances, waiving all questions of intention and all questions of knowledge, it is unlawful for one instrumental in obtaining a pension to charge and receive more than a specified sum. Where the offense is thus simply *malum prohibitum*, where there is no offense growing out of knowledge or intent, I think it is sufficient for the indictment to charge simply that the defendant did the thing prohibited to be done; and that objection fails.

The final question runs along these facts. In the second count the indictment charges that the defendant received from one Morris a sum in excess of that which he might legitimately charge and receive, and it appears by the bill of exceptions that the court permitted the United States to prove that the defendant sold to the pensioner a tract of land for \$900, which was largely in excess of its value. It is insisted that that testimony was incompetent. It does not appear from the exceptions that that was all the testimony introduced in reference to that matter. There is nothing, it is true, in the indictment which charges any sale of land, but I think it clear that, under such a charge, it was competent for the government to prove, as the bill of exceptions said it did prove, that the defendant sold a piece of property to the pensioner

at a value largely in excess of its real value, provided that testimony is supplemented by proof that that was a mere cover, a mere trick, by which he obtained more than the legal fee. That such was the testimony I must assume. It does not appear from the bill of exceptions that such was not the testimony, and I think it is competent for the government, on such a charge as this,—that the defendant has taken from the pensioner more fees than he was entitled to,—to show that he did take that excess, although he made, as an excuse or cover, the pretense of a sale of property, or any other pretense. Of course, if it was a mere voluntary transaction, by which property was sold, although for a sum largely in excess of its value, it does not come within the provisions of the statute; but if it was, as stated, a mere trick, a mere cover, by which the real facts of the transaction were attempted to be concealed, I think the government, under such an indictment, could show it, and, as far as the bill of exceptions discloses, that might have been the testimony produced.

Those are the only substantial questions presented, as I look at the record, and in them I see no error. The judgment of the district court in the matter will be affirmed.

STEAM STONE-CUTTER Co. v. SHELDONS and another.

(Circuit Court, D. Vermont. October 7, 1884.)

1. PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT—PROFITS OF SALES—PROFITS DERIVED FROM USE.

When a patentee, in an action against an infringer who manufactured and sold for use his invention, has had a decree for the profits of such sales, and such decree has been satisfied, he cannot recover, in an action against the party to whom the patent was sold, the profits derived by him from the use thereof.

2. SAME—SALE OF PATENTED ARTICLE—TITLE OF VENDEE.

The recovery of the profits of the sale of a patented article for use, in an action against the vendor, vests the title to the use in the purchaser of the article.

3. SAME—PRACTICE—INTERLOCUTORY DECREE—FINAL DECREE.

Although there has been an interlocutory decree for plaintiff, when it is shown, on the master's report, that he is not entitled to recover, a final decree for defendants may be entered.

In Equity. Exceptions to master's report.

Aldace F. Walker and John W. Stewart, for orator.

Edward J. Phelps and Walter C. Dunton, for defendants.

WHEELER, J. The master's report shows that the Windsor Manufacturing Company made and sold for use to the defendants five channeling machines for cutting out marble from quarries, which were infringements upon the orator's patents; that the orator has had a decree against the Windsor Manufacturing Company for the profits of these sales; that the decree has been satisfied in part by the payment of money, and as to the residue by levy on real estate,

the title acquired by which is in litigation, but has so far been decided in favor of the orator; and that the defendants have derived profits from the use of the machines to the amount of \$5,320.03, for which they should account to the orator, if liable to account at all for such profits. Various questions bearing upon the correctness of this account are raised by exceptions to the report. The principal question is as to the right of the orator to recover these profits at all after having recovered profits for the sales.

The decrees for the accounts in each case were made under the act of 1836. The exclusive right conferred by patents always has been to make, use, and sell for use, the patented invention. In the act of 1790 the words were, "the sole and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery." Chapter 7, § 1, (1 St. at Large, 109.) In the act of 1793 the words were the same. Chapter 11, § 1, (1 St. at Large, 318.) In the act of 1836 the words were changed to, "the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery." Chapter 357, § 5, (5 St. at Large, 117.) In 1870 the words were again changed to, "the exclusive right to make, use, and vend the invention or discovery." Chapter 230, § 22, (16 St. at Large, 201; Rev. St. § 4884.) The effect of these expressions obviously is and was intended to be the same throughout, and is to give an exclusive right to make, use, and sell for use. In the act of 1790 an action was given for devising, making, constructing, using, employing, or vending patented articles without consent of the owners of the patent in writing. Section 4. In the act of 1793, § 5, the expression was changed to give an action for making, devising, and using or selling. The words were again changed in the act of 1800, § 3, to make, devise, use, or sell. By the act of 1836 the owners of patents were left to their actions at law, with the power of the court to increase the damages, and to their right to proceed in equity, where equitable relief was necessary, for infringements, without any words in the statutes to express what should be an infringement or what actions might be sustained for. Sections 14, 15, 17; *Root v. Railway Co.* 105 U. S. 189. The exclusive right was left to be, to make, use, and sell to others for use.

The mere sale of the materials of a machine, complete and fit for operation, would not be an infringement of the patent on the machine, unless the sale was for use. *Sawin v. Guild*, 1 Gall. 485; *Whittimore v. Cutter*, Id. 480. When the orator recovered the profits of an infringement by the making and selling of these machines, it must have been a recovery for a sale for use, for such a sale only could be recovered for. The sale, apart from the use, would not be distinguishable as an infringement. The recovery was as for a tort consisting of the selling and using under the sale. The jurisdiction of the court of equity over the case rested upon the necessity for equitable relief in granting an injunction. Having jurisdiction, the

court retained the case and took an account of the profits of the defendant there, and decreed them to the orator, in order to do justice as far as possible by administering full relief. These principles are fully and elaborately explained, and set at rest for the courts of the United States, in *Root v. Railway Co.* Perhaps, in an action for damages, the orator might have recovered more than the amount of the profits; but, if so, the recovery would have been for the same thing at a higher rate of damages. The orator elected to take the profits as the measure of the recovery. Another recovery for the same thing could not be had against that defendant, neither could it any more be had against any other joint tort-feasor. Undoubtedly, an action at law or a bill in equity, during the life of the patent, could be maintained against those defendants for their use of the machines, apart from the sale, if there had been no recovery for the sale and use; and so an action might, doubtless, have been maintained against both the Windsor Manufacturing Company and the defendants for the use of the machines by the defendants, without reference to the profits of the sales. The defendants here would be liable because they infringed directly by the use; the Windsor Manufacturing Company would be liable because, by the sale, it authorized and promoted the use. They were joint tort-feasors as to the use. One of them has made satisfaction, and but one satisfaction can be had. Had the orator proceeded for the profits of the use none could have been recovered of the Windsor Manufacturing Company, for none were made out of the use by that company. *Elizabeth v. Pavement Co.* 97 U. S. 126. From those defendants they could recover the full profits of the use, as is sought to be done now. The defendants here might have been joined in a suit against infringement by the sale to them, but they could not be held for the profits of the sale, for they made none out of that. The orator could not in any mode recover both for the profits of the sale for use and the profits of the use. Each was a trespass upon the orator's exclusive rights, but not a separate and distinct trespass. A recovery for one would include a recovery for a part, at least, of the other, so that a recovery could be had for either, but not for both. The orator, having had a recovery for one, cannot now have another for the other. *Chamberlin v. Murphy*, 41 Vt. 110.

It is said that the plaintiff has not obtained full satisfaction. But the execution for the enforcement of the decree against the Windsor Manufacturing Company has been returned satisfied, and has not been revived as not actually satisfied. In trespass *quare clausum* the defendant pleaded that the plaintiff distrained his hog *damage feasant* for the same trespass. The plaintiff replied that the hog escaped without his consent, and he was not satisfied. On demurrer, it was held that the action would not lie. Salk. 242; Buller, N. P. 84. Satisfaction need not be in money. The taking of the body of a defendant may be a full satisfaction, and yet yield no money. The return of the execution as satisfied is plenary evidence of its satisfaction

while it stands. *Magniac v. Thomson*, 15 How. 281; Bac. Abr. "Execution," D.

There is another view of this question which has been touched upon formerly in this case, and that is that the recovery of the profits of the sale for use vested the title to the use in the purchaser of the machines. *Stone-cutter Co. v. Sheldons*, 15 FED. REP. 608. It was upon this ground that the recovery of the profits against the Windsor Manufacturing Company was based. *Stone-cutter Co. v. Windsor Manuf'g Co.* 17 Blatchf. 24. This view is supported by several decided cases, (*Perrigo v. Spaulding*, 13 Blatchf. 389; *Spaulding v. Page*, 1 Sawy. 702; *Allis v. Stowell*, 15 FED. REP. 242;) and it is not inconsistent with *Blake v. Greenwood Cemetery*, 16 FED. REP. 676. There, merely nominal damages had been recovered against a manufacturer of the infringing machine, with an injunction. The defendant purchased the machine, and set up the former recovery as a bar to a recovery for the infringement by its use by him. This was held to be no bar, because there had been no recovery for this use, or for the profits or damages on a sale for use. Where an owner of a patent has compensation for the sale of a specific machine embodying the invention, that machine is forever freed from the monopoly. *Bloomer v. Millinger*, 1 Wall. 340. A compensation by recovery in an action for the same thing should have the same effect.

Although there has been an interlocutory decree for the orator, still, as upon the master's report the orator is not entitled to recover, a final decree for the defendants is proper. *Fourniquet v. Perkins*, 16 How. 82; *American Diamond Drill Co. v. Sullivan Machine Co.* 21 FED. REP. 74. The interlocutory decree is understood to have been entered by consent, without hearing, and some other proceedings have been had which may affect questions of costs, and those questions are left open.

Let there be a decree dismissing the bill.

NEW YORK GRAPE SUGAR CO. v. PEORIA GRAPE SUGAR CO.

SAME v. PEORIA STARCH MANUF'G CO.

(Circuit Court, N. D. Illinois. October 20, 1884.)

PATENTS FOR INVENTIONS—SEVERAL PATENTS APPLICABLE TO SAME PROCESS—INFRINGEMENT—EXPIRATION OF ONE PATENT—MOTION TO DISMISS.

Where a bill, in addition to the usual charges of infringement of three patents specified therein, states that "these several letters patent are applicable to the same process, and are so used by defendants," and it appears that it may be impossible to award damages for infringement of two of the patents, without also taking into consideration the value of the other patent, a motion to dismiss the bill as to such patent, because it was so near its expiration that an injunction could not be granted under it, may be overruled. *Betts v. Gallias*, L. R. 10 Eq. 393, distinguished:

In Equity.

Dent & Black and Cratty Bros., for complainant.

Banning & Banning and George F. Harding, for defendants.

BLODGETT, J. This is a bill filed for an injunction and accounting against the defendant by reason of the alleged infringement of three patents,—the first issued June 11, 1867; the second issued September 8, 1868; and the third, on the fifteenth of April, 1873,—all of said patents being issued to J. J. Gilbert for "improvement in the manufacture of starch," and having been, as averred by the bill, duly assigned to complainant. Defendants move to dismiss the bill as to the first-mentioned patent on the ground of want of jurisdiction in equity, because this patent was so near its expiration that an injunction could not have been properly granted under it. I think a demurrer to so much of the bill as relates to the first patent referred to would have been the better method of raising the question, but as the argument proceeded upon the right of complainant to relief in equity on this patent, under the case made in the bill I will consider only the merits of the question discussed by counsel, without reference to the mode of practice which was adopted in getting at it.

Since the decision of the supreme court in *Root v. Railway Co.* 105 U. S. 198, that equity has no jurisdiction in a suit upon an expired patent, when the only relief sought is an accounting for profits and damages, the decisions at the circuit have not been uniform as to such jurisdiction in cases where the patent expires after the commencement of the suit, and before decree. In the opinion in *Root v. Railway Co.* the court cites approvingly *Betts v. Gallais*, L. R. 10 Eq. 393, in which Vice-chancellor JAMES held that he would not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent where it had been filed so immediately before the expiration of the patent as to render it impossible to obtain an injunction. The bill in this case, in addition to the usual charges of infringement of these three patents, states that "these several letters patent are applicable to the same process, and are so used by the defendants." It therefore seems to me that, as there is no question made as to complainant's right to relief in equity as to the two later patents, and as it is charged that all these patents are used in a common process, it may be impossible to award damages for the infringement of the two later patents without also taking into consideration the value of the first patent. I am therefore of opinion that, upon the case made by the bill, it may be necessary to consider the value of all these patents to the complainant in the common process, in which defendants are alleged to use them, and that it may be difficult, if not impossible, to determine their separate value, or the separate profits made by defendants in their use. The bills in these cases were filed more than three months before the expiration of the first patent, and the court cannot, therefore, say, as was said by Vice-chancellor JAMES, that it is impossible to have given complainant an

injunction on the oldest patent, or even to have reached a final decree on the merits before the expiration of the patent. An answer was due at the first rule-day after the filing of the bill, and, for aught the court can say, the case might have been brought to a hearing upon the bill and answer, and decree rendered before the expiration of the earlier patents. There was certainly time to have given notice and argued the application for an injunction, which, the court must assume from the language of Vice-chancellor JAMES, there was not time to do in the case decided by him. It seems to me, therefore, that the case made by this bill is exceptional to those which have been cited in support of the demurrer.

The motion to dismiss as to the patent of June, 1867, is overruled.

BIGLEY v. THE VENTURE.

(District Court, W. D. Pennsylvania. October Term, 1884.)

ADMIRALTY PRACTICE—JURY TRIAL—REV. ST. § 566.

Section 566 of the Revised Statutes does not give a trial by jury in a cause of admiralty and maritime jurisdiction which concerns a vessel employed in commerce and navigation upon the rivers Monongahela and Ohio.

In Admiralty. *Sur* rule to show cause why that portion of the respondent's answer demanding a jury trial should not be stricken out, etc.

Knox & Reed, for libellant.

Barton & Son, for respondent.

ACHESON, J. The respondent claims a trial by jury under section 566 of the Revised Statutes. But the right to such trial in causes of admiralty and maritime jurisdiction, by the express terms of that section, is not general, but restricted to causes arising where the vessel is "at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes." *Gillet v. Pierce*, 1 Brown, Adm. 553; *The Erie Belle*, 20 Fed. Rep. 63. In this case, at the time the cause of action arose, the vessel was employed in navigating the rivers Monongahela and Ohio. Now it is very clear that these rivers come not within the terms "lakes and navigable waters connecting the lakes." *The Hine v. Trevor*, 4 Wall. 555, 566. Moreover, the vessel here was not employed in commerce and navigation between places in different states, but was plying altogether within the Western district of Pennsylvania. The request for a jury trial must be denied, and the rule to show cause made absolute; and it is so ordered.

ALLEN v. WILSON and others.

(Circuit Court, E. D. Michigan. April 7, 1884.)

EQUITY JURISDICTION OF CIRCUIT COURT—JUDGMENT AT LAW.

The circuit courts of the United States have no power to set aside, reverse, or modify a judgment at law or decree in chancery after the term at which it was entered, save only in the cases specified in *Bronson v. Schulten*, 104 U. S. 410.

In Equity.

This was a demurrer to a petition of defendant Canfield to set aside an execution and levy for a deficiency arising out of the sale of mortgaged premises upon foreclosure, to restrain the plaintiff and the marshal from further proceedings to sell the defendant's lands; and also to open the final decree in the cause, and modify the same, so far as it decreed the payment of the mortgaged debt by the petitioner. The bill, which was filed September 19, 1881, charged that defendant was a subsequent purchaser of the mortgaged premises, and alleged that he had assumed payment of the mortgaged debt. A subpoena was taken out and personally served upon all the defendants, September 21st. The ordinary decree *pro confesso*, for want of an appearance, was entered December 17, 1881, and a final decree for the sale of the property, upon the order *pro confesso* and testimony, was made October 3, 1882. The decree was enrolled November 15th. This decree provided "that upon the coming in and confirmation of said report" (master's report of the sale of the mortgaged premises) "said defendants James Wilson and Lucius H. Canfield, who are personally liable for the debt secured by the said mortgage, pay to complainant the amount of such deficiency, with interest thereon as aforesaid from the date of such report, and the complainant have execution therefor." The mortgaged premises were regularly sold under this decree by the master on the twenty-sixth day of January, 1883, report of sale filed, and, in due course, an order of court taken confirming it. By this order of confirmation an execution was again ordered to issue, pursuant to general equity rule 92, as it had before been ordered by the final decree. This order was made in November, 1883. The petition filed by defendant Canfield stated that he was not a party to the mortgage and notes sought to be foreclosed, and that his only connection with the mortgaged premises was this: That the defendant Wilson came to him and stated that he owed the mortgage to one Hathaway, who then held it; that he had not been able to agree with him upon the amount due; that the amount actually due was about \$2,000, and he thereupon requested petitioner to let him have the money to pay Hathaway, and that petitioner should see Hathaway and endeavor to agree upon the amount due, and pay him, if they could agree; that petitioner found, on seeing Hathaway, that the amount due was largely in excess of \$2,000,

and immediately notified Wilson that he could not let him have the money, and that he would have nothing further to do with the matter, and that he never did; that the quitclaim deed made no mention of the mortgage; that petitioner never had anything to do with the premises, and never recorded the deed. The petition denied fully any admission made by petitioner of any liability to pay the mortgage debt. The petitioner further stated, as an excuse for failing to enter his appearance, that plaintiff's solicitor knew before the bill was filed that petitioner had had this quitclaim deed, and hence, when the subpoena was served upon him, knowing there was no basis in fact for a personal decree, he had a right to suppose, and did suppose, that he was made a party to cut off any right or claim to the land under the deed. To this petition plaintiff demurred.

L. D. Norris, for plaintiff.

F. H. Canfield, for petitioner.

BROWN, J. Conceding that the order for an execution for the deficiency, entered in November last, should not have been granted without notice, and that, under general equity rule 88, the petitioner is entitled to a rehearing of such order at this term, it is manifest that it will not avail him to vacate the order unless the decree for the sale of the mortgaged premises be also opened and modified, since this decree provided that petitioner, who was adjudged to be personally liable for the debt, pay the amount of such deficiency after the sale of the premises, and that plaintiff have execution therefor. It is conceded that it is within the power of this court to make this provision in the decree. Equity rule 92.

We are thus confronted again with the question, frequently raised and uniformly decided, whether this court has the power to open a decree by default after the expiration of the term. In this case, three terms expired before the application was made. It would seem that if any principle of law could be settled by adjudications of the supreme court, this one ought to be considered at rest; and yet the occasional hardship of the rule is such that the repeated attempts of counsel to induce the court to let in an unfortunate defendant can scarcely be deemed a matter of surprise. Yet in nearly all these cases there is an element of negligence on the part of the delinquent party, which, under a correct and logical system of practice, ought to estop him from complaining of the harshness of the rule. For example: In the case under consideration the default of the defendant was not entered for three months after the service of the subpoena, during which time he might have entered an appearance. A final decree was not entered until more than a year after such service. He chose, however, to rely upon his supposition that he was made a party only to cut off any right or claim to the premises under his deed, and neglected the most obvious precaution of ascertaining what claim was made against him.

To show how completely we are foreclosed from affording defend-

ant the desired relief, we refer to the following adjudications of the supreme court upon this subject: The question was first decided in *Hudson v. Guestier*, 7 Cranch, 1, in which the court declined to rehear a cause after the term in which it was decided. In *Cameron v. McRoberts*, 3 Wheat. 591, it was held that the circuit court had not power over a decree in equity, so as to set the same aside on motion, after the expiration of the term in which it was rendered. In *Ex parte Sibbald v. U. S.* 12 Pet. 488, decided in 1838, application was made to open a decree of the supreme court entered at a previous term, and the court held that "no principle was better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake; from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing." Neither of these, however, were decrees by default. In 1843 the general equity rules now in force were adopted by the supreme court, the nineteenth of which, as amended, provides that "when the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of 30 days from and after the entry of the order to take the bill *pro confesso*; and such decree rendered shall be deemed absolute unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of defendant." It is difficult to see how language could be more explicit. In *Bank of U. S. v. Moss*, 6 How. 31, the the circuit court for the southern district of Mississippi had set aside a judgment rendered at a preceding term and dismissed the case for what it considered to be want of jurisdiction. The supreme court reversed this order, saying that "even where the record of a circuit court did not contain any averments giving jurisdiction, this court has held that, at a subsequent term, after final judgment, the same tribunal which rendered it could not set it aside upon motion. And we have repeatedly decided, as to judgments of this court, that they could not be changed at a subsequent term, in matters of law, whether attempted on motion or a new writ of error, or appeal, on the mandate to the court below."

The case of *McMicken v. Perin*, 18 How. 507, was much like the one under consideration. In this case a decree *pro confesso* had been entered in the circuit court, and at the same term a final decree was rendered. At a subsequent term the appellant filed a petition in the circuit court, alleging that he had been deceived by the appellee in reference to the prosecution of the bill, and had consequently failed to make any appearance or answer, and that he had a meritorious defense, and prayed the court to set aside the decree and allow him to file an answer to the bill. This petition was dismissed, and the decree of the circuit court was affirmed. Appellant thereupon filed

a bill of review, praying relief from this decree, which he alleged to have been obtained by means of fraud and imposition, setting forth the same facts as before. This bill was dismissed, and such dismissal was affirmed by the supreme court. 22 How. 285. Indeed, that court has since repeatedly decided that a bill of review will not lie, except for errors apparent upon the record, or for some new matter of fact which was not known and could not possibly have been used at the time of the decree. *Whiting v. Bank of U. S.* 13 Pet. 6; *Kennedy v. Georgia State Bank*, 8 How. 609; *Putnam v. Day*, 22 Wall. 60; *Buffington v. Harvey*, 95 U. S. 99; *Beard v. Burts*, 95 U. S. 434. The last case upon the subject of setting aside judgments upon motion is that of *Bronson v. Schulten*, 104 U. S. 410, in which most of the previous cases were considered, and it was again held that there was no power to set aside, vacate, or modify a judgment after the lapse of the term. The exceptions to the general rule are here stated. See, also, *Brooks v. Railroad Co.* 102 U. S. 107. The decisions of the circuit courts are, we believe, without exception, to the same effect. *U. S. v. Brig Glamorgan*, 2 Curt. 236; *Scott v. Blaine*, Bald. 287; *Bank v. Labitut*, 1 Woods, 11; *U. S. v. Millinger*, 7 Fed. Rep. 187; *Newman v. Newton*, 14 Fed. Rep. 634; *School-dist. v. Lovejoy*, 16 Fed. Rep. 323.

In admiralty causes it is provided, by general rule 40, that "the court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind a decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered." In the early case of *The Illinois*, 1 Brown, Adm. 13, decided by Judge WILKINS, of this district, where a decree had been entered up in the absence of respondent's proctor, who was engaged in trying a case in one of the country circuits, the court held that it had no power to set aside the decree after the lapse of the 10 days prescribed by rule 40. This ruling was also adopted by my learned predecessor in the case of *Northrop v. Gregory*, 2 Abb. U. S. 503, and by Judge WELKER, of the Northern district of Ohio, in *The Oriental*, 9 Chi. Leg. N. 134. In England and in several of the United States, including New York, New Jersey, Maryland, and Michigan, the law is well settled, that where, through accident, misapprehension, surprise, or mistake, a party has been prevented from making his defense, the court will allow him to come in after the term. The supreme court has, however, shown no disposition to relax its rule in this particular, and we, therefore, feel compelled to sustain this demurrer and dismiss the petition.

In re Petitions of PETERSEN and others *v.* CASE, Receiver, etc.

(Circuit Court, E. D. Wisconsin. October 16, 1884.)

1. COMMON CARRIER—DELIVERY OF GOODS TO CONNECTING LINE—LIABILITY OF FIRST CARRIER.

When goods are to be delivered by a railroad company to a second line of conveyance for transportation further on, the common-law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. Its obligation while the goods are in its depot does not become that of a warehouseman.

2. SAME—BLOCK IN FREIGHT—DAMAGES CAUSED BY DELAY.

Where, while goods received by the first carrier are in transit, the connecting line notifies it that it cannot receive the goods and transport them to their destination because of a block in freight, this will not relieve the first carrier from liability for damages caused by the delay, where it fails to notify the shipper and give him an opportunity to dispose of the property or take measures for its preservation.

3. SAME—MEASURE OF DAMAGES.

The measure of damages in such a case is the difference between the market value of the goods at the place of destination when they ought to have been delivered and their market value when they were delivered.

At Law.

G. W. Cate, A. J. Smith, and W. J. Turner, for petitioners.

Theodore G. Case and W. C. Larned, for receiver.

DYER, J. In the foreclosure of a mortgage on the Green Bay & Minnesota Railroad, in this court, the respondent was appointed receiver, and as such was empowered to operate the road pending the receivership. In October, 1881, he was so operating the road, the eastern terminus of which was Ft. Howard, where there existed connections with the Chicago & Northwestern Railway for the transportation of freight shipped on the receiver's line of road, and destined for Chicago. On the third day of October, 1881, the petitioner Petersen shipped over the respondent's road, at Amherst Junction, Wisconsin, two car-loads of potatoes consigned to a commission house in Chicago. On the fifth day of the same month he shipped from the same place, over the same line of road, two other car-loads of potatoes, consigned to the same parties as were the first. On the third day of the same month the petitioners Allington & Co. also shipped over the receiver's line of road, at Amherst Junction, one car-load of potatoes, consigned to a commission firm in Chicago. The course of transit was over the Green Bay & Minnesota road, from Amherst Junction to Ft. Howard, thence, via the Chicago & Northwestern Railway, to Chicago.

In the *Petersen Cases* bills of lading were issued to the shipper, wherein it was stated that the potatoes were received "in apparent good order by the receiver of the Green Bay & Minnesota Railroad, * * * to be transported over the line of this railroad to Chicago, and delivered after payment of freight, in like good order, to a company or carrier, (if the same are to be forwarded beyond the lines of

this railroad,) to be carried to the place of destination; it being expressly agreed that the responsibility of the receiver shall cease at his depot, at which the same are to be delivered to such carrier." The bills of lading also contained this further clause: "It is further especially agreed that, for all loss or damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only in whose custody the said packages may actually be at the time of the happening thereof; it being understood that the receiver of the Green Bay & Minnesota Railroad assumes no other responsibility for their safe carriage or safety than may be incurred on his own road." The bill of lading in the case of Allington & Co. was like those issued on the Petersen shipments, except that it was therein stated that the property was to be carried over the Green Bay & Minnesota road to Green Bay, "and delivered, after payment of freight, in like good order, to C. & N. W., * * * to be carried to the place of destination." This difference in the terms of the bills of lading is not material, because it must have been the understanding of the parties that the carriage of the property over the line of the Green Bay & Minnesota road terminated at Ft. Howard, and that it was to be there delivered by the receiver to the Chicago & Northwestern Railway for transportation to Chicago.

It appears from the proofs that the potatoes shipped at Amherst Junction on the third of October, reached Ft. Howard at 5 o'clock p. m. of that day; that of the shipments of October 5th, one arrived at Ft. Howard at 5 p. m. of that day, and the other at the same time of day on the 6th; and the evidence shows that within 24 hours after the arrival at Ft. Howard of each of these shipments, a freight train left that place for Chicago on the Chicago & Northwestern road. The precise character of the running connections between the two roads at Ft. Howard is not shown; but it is evident that there was a business arrangement between them by which freight brought to Ft. Howard over the Green Bay & Minnesota road, and consigned to points south and east, was transferred to the Chicago & Northwestern road, and forwarded to its destination; and that the cars of the former road, containing bulk freight brought from points inland, were run upon the track of the latter road at Ft. Howard, without breaking bulk, and were put into the trains of the Chicago & Northwestern Company, and taken through to points on its road to which the freight was consigned. It is shown that at Ft. Howard there was a Y track connecting the Green Bay & Minnesota road with the Chicago & Northwestern, and by the course of business, cars from points on the former road, containing freight destined south, were switched from the respondent's yard tracks, by his employes, to the Y track, and were there taken by the employes of the Chicago & Northwestern Company and placed in the trains of that company; so that delivery of such cars to the latter company was accomplished when they were placed on the Y.

It appears from the testimony that from about the third to the tenth of October, 1881, there was a freight blockade at Chicago, which it is claimed rendered it impossible for the Chicago & Northwestern and certain other railroad companies to promptly deliver certain kinds of freight to consignees in Chicago. This blockade was occasioned by the inability of roads running east to take away the cars containing through freight destined east, as fast as they arrived on roads running north and west; by reason of which state of things there was an accumulation of cars containing through freight bound east, which prevented the handling of cars constantly arriving, containing freight to be delivered to Chicago consignees. In consequence of this pressure of freight, the Chicago & Northwestern Company, on the fifth day of October, requested the respondent to stop shipments of potatoes and barley in bulk from points on his line to Chicago until the 12th, and all agents at stations on the respondent's road were immediately instructed to refuse such shipments. It would seem that the respondent did not receive notice of the Chicago blockade, and, consequently, did not notify his agents until after the cars containing the potatoes here in question had left Amherst Junction, and were either in transit to or had arrived at Ft. Howard. Having arrived at that point, the agent there in charge—who was the joint agent of the two roads—was instructed not to place the cars on the Y for delivery to the Chicago & Northwestern Company until October 10th. Accordingly, these cars, with their contents, remained in the respondent's yards until that day, when they were delivered to the Chicago & Northwestern Company, and reached their destination on the eleventh or twelfth of the month. On delivery to the consignees, the potatoes in all the cars were found to be so seriously decayed that a large loss was sustained in the sale of them; and this loss, which the petitioners attribute to delay in their transportation, they seek to recover from the respondent.

In resisting the petitioners' demands, the respondent claims that the potatoes were unsound when they were shipped at Amherst Junction, and there is considerable testimony bearing upon this issue of fact. It is unnecessary to discuss this testimony in detail. The bills of lading issued by the respondent state that the potatoes were received for transportation in apparent good order, and on the part of the petitioners it is shown that the potatoes were loaded from wagons into the cars as received; that they were examined and assorted with care; and that when shipped they were in sound merchantable condition. This is very positively sworn to by the shippers, and by various witnesses who handled the potatoes. It is also in proof that other potatoes shipped to Chicago at about that time, and which were transported in the usual time over another line of road, arrived in good merchantable condition. On the part of the respondent it is shown that the season of 1881, in consequence of continued wet weather through the month of September, was an extremely unfavor-

able one for the shipment of potatoes. Some of the witnesses testify that they sustained heavy losses from decay of potatoes shipped from points near Amherst Junction to Chicago which were not delayed in transit, but none of them purchased and shipped potatoes at Amherst Junction, nor did they see the potatoes which the petitioners shipped. Experts testify that potatoes which were dug before they were fully ripe, and freshly shipped, in the state of weather then prevailing, were extremely liable to develop unsoundness, and that this could not be prevented by the utmost dispatch in transportation. They also express the opinion that if the potatoes in question were sound when shipped they would have sustained no injury by the delay proven in this case. In considering this testimony my mind has not been free from doubt upon the question of fact in dispute, and it must be admitted that the respondent's contention is not without support, if the testimony which he adduces is entitled to weight. In short, if the opinions of experts, and the experience of other shippers, and the testimony which tends to show that the potato crop of 1881, in northern Wisconsin, was exceptionally liable to disease, are to prevail against the positive testimony of the petitioners, and of witnesses who handled these potatoes, and the fact that other potatoes shipped from the same locality and transported with usual dispatch arrived in Chicago in merchantable condition, then the conclusion must be that the loss sustained by the petitioners is attributable to unsoundness of the potatoes when they were shipped. But giving to the evidence adduced by both parties its due weight, one side being supported by positive assertions of fact founded upon personal observation and knowledge, and the other by opinions and conclusions deduced from a general state of facts perhaps not applicable to the particular case, the court, in the exercise of a judicial judgment, must conclude that the fact in dispute is as proven by the petitioners. The evidence on their part is positive; that on the part of the respondent is in its nature negative, based rather on supposition and conjecture than on knowledge of the facts in the particular case.

So, too, upon the evidence before the court, the conclusion must be that the injury to the potatoes resulted from the delay in their transportation. Each car contained between 400 and 500 bushels. The weather at the time, in the language of the witnesses, was warm, damp, and muggy. The potatoes may not have been, strictly speaking, perishable property, according to the ordinary classification of railroad freight. But the season was such that delay in their transportation was hazardous. The proofs show that from the third to the eleventh of October the temperature at Ft. Howard ranged at midday from 50 degrees to 76 degrees above zero. It appears that the three car-loads shipped on the 3d, and which were consequently longest delayed, were most seriously injured, and one of these is described as steaming with heat and decay on arrival in Chicago. This was a car containing 470 bushels, then worth if in sound condi-

tion one dollar per bushel, but for which the petitioners Allington & Co. realized only \$69. The testimony tends to show that the process of decay, once begun, would rapidly go on, where, in such weather, potatoes in such quantities were confined in a close box car of ordinary construction, in which there were not free circulation of air and opportunity for the moisture to evaporate. Taking the evidence as it stands, I must hold that the petitioners proved, at least *prima facie*, the soundness of the potatoes when shipped. The burden of showing that they were not sound then fell upon the respondent, and this he has not shown by such testimony as outweighs that of the petitioners and their witnesses. It need only be added in this connection that if the original injury was attributable to the fault of the respondent, then he is legally chargeable, as between him and the petitioners, with the continuing consequences of that fault; namely, the loss resulting from the continued decay of the potatoes while in the whole course of transit to Chicago.

The question of legal liability upon the facts as proven, remains to be considered. The learned counsel for the respondent argued at some length, and cited many authorities upon the point, that, as a common carrier, he was not liable for any negligence or delay in transportation occurring on the connecting carrier's line. Admitting this to be so, it does not appear that the point is a material one in the case. The respondent was under obligation to safely deliver the potatoes to the next carrier in the line in as good order as when received. As we have seen, according to the course of business between the two carriers, delivery of such freight was made by placing the cars on the Y at Ft. Howard, where they were taken away by the Chicago & Northwestern Company. Until the cars containing these potatoes were thus delivered, they remained in the possession of the respondent, and his common-law liability as a carrier continued until such delivery. The law on this subject was settled in *Railroad Co. v. Manufacturing Co.* 16 Wall 318, where it was held that when goods are delivered to a common carrier, to be transported over his railroad to his depot, in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common-law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation while the goods are in his depot does not become that of a warehouseman. While, therefore, these cars of potatoes were in the possession of the respondent at his depot in Ft. Howard, they were, in the eye of the law, still in transit, and the liability of the respondent therefor, continued unbroken, except as such liability may have been limited by the bills of lading, until they were actually delivered to the next carrier in the line. *Railroad Co. v. Mitchell*, 68 Ill. 471; *Conkey v. Railroad Co.* 31 Wis. 619. The clause in the bills of lading that the responsibility of the receiver should cease at his depot, must be read in connection with the other provisions of the contract.

That clause did not qualify the obligation of the respondent to deliver the freight to the Chicago & Northwestern Company, and to deliver it in as good order as when received. It was at the depot, or presumably within the depot limits, that such delivery was to be made; that is, on the Y track connecting the two lines, and used for that purpose.

The respondent's general liability being as heretofore stated, was his failure to promptly deliver this freight to the Chicago & Northwestern Company excused by the refusal of that company to take it in consequence of the blockade at Chicago, and what duty, if any, in view of the action of that company, did the respondent owe to the petitioners? It is to be observed that the notice of the Chicago & Northwestern Company to the respondent that it would not receive further shipments of potatoes and barley from his road until October 10th, was not given until after the petitioners' property was in transit. The first carrier was then in possession of the property, exercising control over it, as a common carrier. It may be doubtful whether the evidence shows such an inability to deliver freight to Chicago consignees at that time as would excuse the last carrier from the obligation to complete the transportation of freight which had been previously received by the first carrier and was then actually in transit. But I take it that is exclusively a question between the two carriers, and with which the petitioners have no concern. If the refusal of the Chicago & Northwestern Company to receive this freight from the respondent was a violation of any business arrangement between the two carriers,—a question not arising here,—that might raise a controversy between them, but it would concern them alone, and the rights of the petitioners ought not to be affected thereby. I do not forget the case of *Helliwell v. Railway Co.* 10 Biss. 170, in which this court held that if at the time of making a contract for shipment of freight the carrier has no doubt, and if the condition of business on its lines gives it no ground for doubting, that suitable means will be at its command within the usual and ordinary time for conveying the freight, and if all reasonable efforts are seasonably employed to obtain such means, and the delay is solely occasioned by an extraordinary influx of freight upon its lines arising subsequently to the making of the contract, the carrier will not be held responsible for the delay. But this presupposes that there was no negligence on the part of the carrier. And here we touch the point upon which, in its legal aspect, these cases turn. Conceding that the inability of the respondent to forward the potatoes from Ft. Howard was attributable to causes which he could not control, it then became his duty to use all reasonable means to preserve the property from loss, and to that end he should have notified the shippers that the property could not be forwarded, thereby enabling them to otherwise dispose of the property, or to take measures for its preservation. If the potatoes when shipped were not, in a strict sense, perishable

property, it is evident they became such while in the respondent's custody. He knew on the fifth of October that they could not be forwarded before the 10th, and would not in due course reach their destination before the 11th or 12th. The petitioners were shippers at a point not remote on his line of road, and it was not difficult to notify them of the situation of their property. I think it was his duty, as the custodian of the property, to give them such notice, and thus enable them to protect themselves, as far as possible, against loss.

In *Conkey v. Railway Co.* 31 Wis. 637, Mr. Chief Justice Dixon was of the opinion that in the case of an interruption of transportation from extraordinary causes, rendering it impossible to send merchandise forward, the carrier might store the property, and at once give notice to the owner, and thus absolve himself from liability as a carrier. It is not claimed that any notice was given to the petitioner Petersen. The station agent testifies that he told the petitioner Allington, on the seventh of October, that the potatoes were then at Green Bay, and requested him to inform Petersen. But Allington unqualifiedly denies this. The petitioners Petersen and Een swear that they had no information as to the whereabouts of the potatoes, and there is no proof to the contrary. Another witness, not a party to these cases, testifies that on the twelfth of October he was at the Amherst Junction station with Allington, Petersen, and one Couch, who had something to do with the shipments; that Couch asked the station agent if he knew or could tell where the cars of potatoes were, and that he answered he could not. The station agent himself testifies that he first heard that the cars were at Ft. Howard on the 7th, which was four days after part of the potatoes had been shipped from Amherst Junction, and there is evidence that one of the petitioners called on the agent almost daily for information about the potatoes, but got none. There is no proof that anything was done with the potatoes at Ft. Howard, except to leave them as they were shipped, in the car on the side track; and deciding this question, as I must, upon the preponderance of testimony, I am obliged to hold that notice to the shippers of the delay and situation of the property is not proven, and therefore that the respondent held the potatoes during the period of delay subject to the common-law liability of a common carrier.

The measure of damages in these cases, is the difference between the market value of the potatoes in Chicago when they ought to have been delivered, and their market value when they were delivered. Under this rule of damages, the petitioners, upon the testimony, are entitled to recover the amounts claimed by them in their petitions; and orders will be entered requiring the respondent to pay to the petitioner Petersen the sum of \$863.63, and to the petitioners Allington & Co. the sum of \$367.70.

SULLIVAN v. CHRYSOLITE SILVER MIN. Co.

(Circuit Court, D. Colorado. October 16, 1884.)

PRACTICE—DIRECTING VERDICT—NEGLIGENCE.

When, in an action for personal injuries caused by defendant's negligence, upon the whole testimony the court would not feel justified in sustaining a verdict for the plaintiff, it should direct a verdict for the defendant; and that, although there may be some evidence which would raise a possibility or a suspicion that the plaintiff was entitled to recover.

Motion for New Trial.

Mr. Morrison, for plaintiff.

J. B. Bissell, for defendant.

BREWER, J., (*orally*.) The case was tried before a jury. At the close of the testimony the jury were directed to return a verdict for the defendant. Plaintiff asks a new trial. It is an action under the statute for damages for negligence causing the death of the ancestor of the plaintiffs. The facts are these: The decedent was one of a party of three working at the bottom of a mine; the signal was given by the shift-boss to lower the cage; it did not come down as quickly, perhaps, as expected. It should be stated, *first*, that at the bottom of the shaft there were two compartments: one a pump compartment, and the other, where they were at work, a cage compartment. If the cage came down in the one compartment anybody under it would be struck. It was perfectly safe for any one, when that cage was descending, to step into the pump compartment; it was also reasonably safe for parties to stand in the corner of the pump compartment, and the cage could pass down without touching. Instructions were given by those in charge that whenever that cage was called for, or was coming down, for the employees to step into the pump compartment, where, of course, there would be no danger. The testimony of one of the two survivors is that, up to the time of this injury, they had always obeyed that order, and gone into the pump compartment. There is no dispute in the testimony but what this order was given to the decedent, and he had been working there for two or three weeks, at least, perhaps more. He stood in the corner of this cage compartment, and, the cage not coming down, for some reason unknown, stepped forward, and as he stepped forward the cage fell, struck and killed him. And it was argued very forcibly by the counsel for the plaintiff that a man in that position was not bound to wait indefinitely. Finding that the cage did not come as called for, he might naturally think there was danger—some trouble about the cage; that it might come down hastily; and might properly jump into or hasten to a place which would be safe; and that it could not be affirmed that it was negligence on his part to take that risk; and several illustrations were cited in respect to a descending elevator. That is all very true, but for the antecedent fact that he had no right to stand in that

corner. It is true, the shift-boss himself stood in another corner, but that was in disobedience to the orders. If he had been standing in a place where by the orders he was authorized to stand, and had simply sought a place of more apparent safety, it might be said that such an act was not negligent; but when, in the first instance, he assumed a place which he was forbidden by the orders of the company to occupy, which was comparatively dangerous, and had failed to take the place which, by like directions, he was required to take, then his action in going from one place to another is at his own risk; he can excuse himself for his action only when he has occupied the place which he had been directed by the company to occupy.

Counsel very earnestly, too, pressed upon the court that, whether the court thought or not that such action was negligent, it was a matter which should be submitted to the judgment of 12 men, that of a jury, and that it ought not to be taken from them, because they being men in daily life, more familiar with practical affairs, would be more apt to decide correctly what was and what was not negligence; and it was urged that it was trespassing upon the province of a jury to take that question from them. I think the rule controlling federal courts—one that is also recognized in some of the state courts—is that when upon the whole testimony, the court would not feel justified in sustaining a verdict for the plaintiff, it should direct a verdict for the defendant; and that, although there may be what is sometimes called a "*scintilla*" of testimony, or something which would raise a possibility or a suspicion that the plaintiff was entitled to recover. The court is responsible for every judgment that is rendered, and should never avoid or shirk that responsibility; and I think much of the complaint which exists to-day against the jury system arises from a hesitation on the part of many judges to assume their full responsibility. A question arises of negligence or otherwise, and the court says it is a question of fact,—let it go to the jury; and although clearly of the opinion that the verdict should be one way or the other, yet they evade the responsibility which properly belongs to it by saying 12 men have said so and so, and it is their province to settle questions of fact. Now, I think that it is the imperative duty of a judge to hold every case before him closely in his own hand, and when satisfied that the verdict should be one way or the other, to see that it is so, and to render judgment accordingly. And in this case, while there was some testimony upon which a jury might find that the defendant was guilty of negligence, although it was not absolutely demonstrative of negligence on its part, yet it seems to me, taking all the testimony together, the court could not do otherwise than affirm that the decedent was himself negligent, and that his negligence contributed to the result.

The motion for new trial will be overruled.

UNITED STATES *v.* SLINEY and others.

(Circuit Court, W. D. Pennsylvania. April 30, 1884.)

1. EJECTMENT—PLAINTIFF'S TENANT IN POSSESSION—ASSUMED AGENCY.

Where one standing in confidential relations to and assuming to act for the plaintiff put another into possession of land as the plaintiff's tenant, a defendant in ejectment, as against the plaintiff, cannot question the professed agent's authority to create the tenancy.

2. SAME—CONSTRUCTIVE NOTICE OF LANDLORD'S TITLE.

Actual, exclusive, and visible possession of land by a tenant is constructive notice of his landlord's title equivalent to that afforded by the recording of a deed.

3. SAME—SECRET ATTORNMENT.

It is not in the power of a tenant to destroy his landlord's possession by a secret attornment to another, and as against the landlord such attornment is void and of no effect.

4. SAME—QUITCLAIM—BONA FIDE PURCHASER WITHOUT NOTICE.

A purchaser by deed of quitclaim simply is not to be regarded as a *bona fide* purchaser without notice.

5. SAME—CASE STATED.

H., who entered upon the plaintiff's land as tenant, during his tenancy was induced secretly to attorn to and take a lease from S., who subsequently, with actual knowledge of the plaintiff's title, obtained quitclaims for trifling considerations from the widow and heirs of a deceased former owner who had conveyed, by an unrecorded deed, to a party under whom the plaintiff claims. S. then conveyed an undivided one-third of the land (H. being still in possession) to K. *Held*, that inquiry of H. was incumbent upon K., and that the latter was chargeable with constructive notice of the plaintiff's title.

Ejectment. *Sur* motion *ex parte* defendants for a new trial.

George C. Wilson, for plaintiff.

John M. Thompson and B. C. Christy, for defendants.

ACHESON, J. While it is true that the extent of J. B. Agnew's authorized agency was left uncertain by the proofs, it did clearly appear that he stood in confidential relations to and represented the United States in respect to the tract of land in controversy; and the jury have found, upon ample evidence, that by his authority John G. Huddleson entered upon the land in March, 1876, as the tenant of the United States, and that he continued in possession until and at the time when George W. King purchased and took his deed from John Sliney. Now, as the authority of Agnew so to put Huddleson upon the land has never been questioned by his principal, and it was manifestly to the interest of the United States to have a tenant in possession, I am at a loss to see by what right the defendants can dispute Agnew's power to lease to Huddleson, when his tenancy is now set up by the United States. When Huddleson went upon the land, he entered (as he swears) by permission of Agnew, under the title and as the tenant of the United States. He could not otherwise enter without being a trespasser, and Agnew could not put him upon the land save as such tenant without a gross violation of his duty as attorney and agent of the government. I think, then, the tenancy of

Huddleson under the United States must be accepted as a fact sufficiently proved.

Huddleson's possession was actual, exclusive, and visible, and considered as that of his landlord, the United States; it was notice to King of the title of the latter, for by the settled law of Pennsylvania such possession of land is sufficient to put the purchaser on inquiry, and is constructive notice equivalent to that afforded by the recording of a deed. *Krider v. Lafferty*, 1 Whart. 303; *Sailor v. Hertzog*, 4 Whart. 259; *Lightner v. Mooney*, 10 Watts, 407. It is, however, contended that Huddleson's possession ceased to be that of the United States when induced by Agnew to attorn to John Sliney; he took from the latter on July 22, 1876, a lease of the premises. But, unquestionably, that transaction was a nullity, and the lease void as against the United States. *Tayl. Landl. & Ten.* § 180. It is not in the power of a tenant to destroy his landlord's possession by a secret agreement to attorn to another. *Rankin v. Tenbrook*, 5 Watts, 387. Such agreement is in law deemed fraudulent and collusive, and therefore void and of no effect. *Id.*

When Huddleson attorned to Sliney the latter had not the shadow of title to the land, and such as he afterwards acquired he took with notice of the prior title of the United States. Confessedly he was a purchaser *mala fide*. With full knowledge that by the unrecorded deed of December 10, 1864, James Gordon had conveyed the land to Cornelius Curtis, under whom the United States claim, Sliney, for considerations little more than nominal, obtained from the widow and children, the heirs at law, of Gordon, quitclaim deeds, one dated July 24, and the other, August 4, 1876. King's title comes through these quitclaim deeds; Sliney, for the recited consideration of \$2,000, conveying to him the undivided third of the whole tract of 437 acres by deed dated March 15, 1877. Can King, as against the United States, claim to be a *bona fide* purchaser without notice?

That a purchaser by deed of quitclaim simply is not to be regarded as a *bona fide* purchaser without notice, is authoritatively decided. *Oliver v. Piatt*, 3 How. 333; *May v. Le Claire*, 11 Wall. 217; *Villa v. Rodriguez*, 12 Wall. 323; *Dickerson v. Colgrove*, 100 U. S. 578, 584; *Baker v. Humphrey*, 101 U. S. 494, 499. Now, King, dealing in respect to a large and valuable tract of land with a vendor whose title was derived exclusively from quitclaim deeds, upon trifling considerations, executed by the widow and heirs of a deceased former owner, found in the actual and exclusive possession of the land John G. Huddleson, who entered thereon as the tenant of the United States, and whose tenant (as we have seen) he continued to be and then was, notwithstanding the abortive attornment of July 22, 1876. What, then, was the duty of King? It seems to me clear that inquiry was incumbent upon him, (*Hood v. Fahnestock*, 1 Pa. St. 470;) and inquiry of Huddleson, undoubtedly, would have elicited all the facts to which he frankly testified on this trial. Adopting the language of

the court in *Hood v. Fahnestock*, Id. 476, it may be said: "No person can doubt that, if ordinary and common prudence had been observed, this purchase would not have been made," if, in fact, King was acting in good faith. Under the evidence here, I think the case is fairly within the recognized principle that whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty,—as it always is with a purchaser,—and would lead to a discovery of the requisite fact by the exercise of ordinary diligence and understanding. *Hill v. Epley*, 31 Pa. St. 331.

The defendant's counsel, in the course of the argument on this motion, assumed that Huddleson, after the transaction of July, 1876, held himself out to the world as the tenant of Sliney. If this were so, I am not prepared to admit that it would better King's position. *Stockwell v. Robinson*, 1 Pa. St. 477. But, in fact, the evidence disclosed nothing of the kind. That transaction was altogether a secret attornment, and was followed by no visible change in the relations of any of the parties to the land. Nor did it appear that King knew of the existence of the lease of July 22, 1876. But, had this been shown, I am not sure that the fact would have helped his case in anywise; for knowledge that one in possession of land had attorned to an entire stranger, without pretense of title, who subsequently acquired the Gordon quitclaim deeds, would naturally have stimulated an honest purchaser to further inquiry. I am not convinced that there was any error in the instructions to the jury, and the result of the trial, I believe, is in accordance with the justice of the case.

And now, April 30, 1884, the motion for a new trial is denied, and it is ordered that judgment in favor of the plaintiff be entered upon the verdict.

**WHITTENTON MANUF'G CO. v. MEMPHIS & OHIO RIVER PACKET CO.
and others.**

(Circuit Court, W. D. Tennessee. October 22, 1884.)

1. COMMON CARRIER—NEGLIGENCE—FORM OF ACTION—CONTRACT AND TORT—PLEADING.

The plaintiff has an election to sue in contract or tort for damages by negligence of the carrier, and the distinctive character of the declaration depends upon the requisite nature of the remedy to which he is entitled on the facts he states, rather than on the mere form of the declaration, though that cannot be wholly disregarded in determining whether he has elected the one cause of action or the other. Tort is the natural and habitual foundation of the action for the breach of the ordinary contract of carriage, and the declaration will be so construed, unless the facts of the case clearly show that the plaintiff has elected to sue on the contract.

2. SAME SUBJECT—BILL OF LADING—PROPERT—TENN. CODE, § 2893—ACT OF 1819, CH. 27, § 2.

The Tennessee Code, § 2893, perpetuating the act of 1819, c. 27, § 2, and enacting that the plaintiff shall make profert of any instrument in writing "upon

which the action is founded," does not require proof of a bill of lading stated in the declaration as one of "the facts of the case," if it appears that the plaintiff has not clearly elected to sue on the contract contained in the bill of lading.

2. SAME SUBJECT—CASE IN JUDGMENT.

Where the declaration was joint against the party signing the bill of lading and another not signing it, avers an "agreement" disconnected with the bill of lading not alleged to be in writing, states the bill of lading as an inducement to the cause of action, does not make proof of it, and the breaches assigned seem to be of the joint "agreement," and not of the contract contained in the bill of lading, the declaration will not be construed as "founded on" the bill of lading.

On Demurrer.

The plaintiff sued the defendants for damages to about 1,000 bales of cotton, alleged to have been caused by their negligence. The third count of the declaration to which the demurrer—quoted in the opinion of the court—was taken is as follows:

"*Third.* And the plaintiff, the Whittenton Manufacturing Company, a corporation and a citizen, as aforesaid, complains of the defendants, the Memphis & Ohio River Packet Company and the Merchants' Cotton Press & Storage Company, corporation and citizen, as aforesaid, for that, on, to-wit, the various dates stated below, the plaintiff, through E. Hobart & Co., their agents, purchased in Memphis, Tennessee, of divers persons, the owners thereof, to-wit, 1,002 bales of cotton, as follows, [giving dates and number of bales,] to be shipped to the plaintiff at Taunton, Massachusetts, and there delivered to it. At the dates of the said several purchases of the said cotton the same was in lots and in the custody of the several vendors or their warehousemen in the city of Memphis, and the several lots thereof, before removal, were examined, sampled, weighed, and classed, and ship-marked on behalf of plaintiff, and were found to be in good order and condition, and to correspond with the samples; and thereupon, by agreement, embracing each and all the transactions—to be stated below—between the plaintiff, through its agents, E. Hobart & Co., on the one side, and the said Mammoth Cotton Compress Company and the Union Cotton Compress Association and the defendant, the Memphis & Ohio River Packet Company, jointly and severally, on the other, each lot of said cotton, as received by the plaintiff from the vendors, was delivered in like good order and condition to the said Mammoth Cotton Compress Company and the Union Cotton Compress Association, or one of them, who received the same under the said agreement, to be by them, as was also agreed, as aforesaid, compressed and prepared for shipment for certain compensation to be paid, as was agreed, as aforesaid, and thereupon, as was also agreed, as aforesaid, through the defendant, the Memphis & Ohio River Packet Company, then to be safely transported from Memphis, Tennessee, to Taunton, Massachusetts, for certain other compensation, agreed, as aforesaid, to be paid. Each lot of the said cotton was delivered in pursuance of the agreement aforesaid, and when so delivered was receipted for as in good order and condition, and by the agreement first herein alleged, was to be kept by the said defendants, each and all, in like good order and condition during the compressing and preparation for shipment and during the transportation, and until the delivery at Taunton, Massachusetts, as aforesaid, and until delivery to the plaintiff. After the said 1,002 bales of cotton had been so received to be compressed and prepared for shipment, and had been receipted for as aforesaid, all which was done in pursuance of the agreement aforesaid, the defendant, the Memphis & Ohio River Packet Company, still pursuing the said agreement first made, delivered the plaintiff, through its agents, E. Hobart & Co., its three several bills of lading, whereby the re-

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ceipt of the cotton was acknowledged, and it was stated that the said cotton was in good order and condition, and whereby it was agreed that for certain compensation stated it would transfer and deliver the said cotton in like good order and condition at Taunton, Massachusetts. The said bills of lading bear date, respectively, December 13, 1879, for 200 bales; December 19, 1879, for 500 bales; and December 29, 1879, for 302 bales.

"The defendants did not ship the said cotton promptly and speedily, as was their duty under the joint and several agreement, aforesaid, but neglected to do so, and, disregarding their contract and their duty, shipped the same about as follows, to-wit: On December 17, 1879, 174 bales by the steam-boat Cons. Miller; on December 20, 1879, 14 bales by the steam-boat Andy Baum; on December 23, 1879, 512 bales by the steam-boat Vint. Shinkle; on December 30, 1879, 302 bales by the steam-boat Virgie Lee. The defendants wholly failed to care for and properly protect the said cotton according to their joint and several agreement, aforesaid, but so negligently and carelessly conducted themselves with respect to it while it was in their possession under the agreement, aforesaid, and was being compressed and prepared for shipment, and while it was being shipped, and while it was being transported, that a large part of it, to-wit, 920 bales, by reason of such carelessness and negligence, were greatly damaged and injured, to-wit, by exposure to rain and snow, and by being brought in contact with mud and filth, so that when the same was delivered to the plaintiff at Taunton, Massachusetts, it was not in good order and condition, but had been greatly injured and damaged and depreciated in value, to-wit, to the amount of five thousand dollars. And afterwards, to-wit, on July 1, 1880, the said Mammoth Cotton Compress Company and the Union Cotton Compress Association became the Merchants' Cotton Press & Storage Company, one of the defendants here, which succeeded and became chargeable with and promised to pay all their debts and liabilities, respectively, all as hereinbefore alleged. And therefore the plaintiff sues the defendants for six thousand dollars damages."

W. M. Randolph, for plaintiff.

H. C. Warinner, for defendants.

HAMMOND, J. When this case was before the court at a former day on a motion to replead, the motion was granted. *Whittenton Manuf'g Co. v. Memphis & Ohio River Packet Co.* 19 FED. REP. 273. To the declaration then filed the defendants demurred on several grounds, all of which have been cured by amendment, except one. This is: "*Second*, because said count does not make profert of the bill of lading alleged to have been executed by defendant." The law of Tennessee on the subject of "profert" is peculiar. The Code enacts: "Profert shall be required as heretofore, and a demurrer may be filed for want thereof." Tenn. Code, (T. & S.), § 2893. This means that the act of 1819, c. 27, § 2, (Car. & Nich. 551,) was continued in force. It enacts: "In all cases * * * the plaintiff shall be compelled to produce any instrument of writing, not under seal, within the power of the party to produce, upon which his, her, or their action is founded; * * * and, if the cause is pending in a court of record at the return term, make profert of the same in his, her, or their declaration, unless longer time is given."

Now, at common law, profert being required only of sealed instruments "under which the party claimed title," it became settled under

this act that its only effect was to put unsealed instruments upon which the "action is founded" upon the same footing as profert of sealed instruments at common law. Tenn. Code, § 2893, and notes. *Gardner v. Henry*, 5 Cold. 458; 3 Meigs, Dig. (2d Ed.) 2184. At common law a deed stated merely as an inducement in pleading did not require profert. 1 Chit. Pl. 265; Gould, Pl. 414; Bouv. Dict. tit. "Profert;" *Banfield v. Leigh*, 8 Term R. 573. It is not necessary, for example, in a suit upon a bond, to make profert of a deed for the performance of the covenants of which the bond was given. *Sneed v. Wister*, 8 Wheat. 690. Nor in a suit upon coupons is it necessary to make profert of the bond from which the coupons were taken. *Nashville v. Bank*, 1 Baxt. 402; *Nashville v. Insurance Co.* 2 Baxt. 296.

Mr. Schouler, in his excellent work on "Bailments," says of the form of action against a carrier that it may be *ex delicto* or *ex contractu* at the election of the plaintiff. And, "where the transaction and character of the loss require the plaintiff to show a contract, express or implied, with the carrier, to support his action, contract is the true remedy; otherwise the preferable form of action is tort." Schouler, Bailm. 557; 2 Add. Torts, § 1415; 2 Bac. Abr. tit. "Carriers," B, 152. The action *ex delicto* is for a breach of duty founded on the custom of the realm, and it makes no difference that there is a contract by the carrier out of which the duty arises, unless there is something special in the contract upon which the plaintiff must rely for his action, in which case his suit necessarily must be *ex contractu*. In the ordinary contract the plaintiff has his choice as to the form of action he will use; and where the action is *ex delicto* the carrier may plead in defense any stipulations of a contract which has relieved him from the alleged breach of duty. Schouler, Bailm. 575; Hutch. Carr. § 748.

In *New Jersey Nav. Co. v. Merchant's Bank*, 6 How. 344, 381, the court say: "The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of conveyance, unless arising from inevitable accident," etc. Again, "the burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

Mr. Hutchinson, in his able work, also discusses this subject, and states the difficulties, even under the old practice, of determining the proper form of action to be brought, and, when brought, whether it be one or the other of the two forms allowable. He says that until *Dale v. Hall*, 1 Wils. 281, the form of action was *ex delicto*, and that case decided that, even where it is on the contract, the declaration is the same in effect as if it had been upon the custom. Hutch. Carr. § 737 *et seq.* He calls attention to the perplexities formerly existing in

distinguishing one form of action from the other, and says: "The declarations of the two kinds of actions, according to approved formulas, were so nearly alike, that in many cases the astutest judges became perplexed in their efforts to find out to which class the declaration belonged." *Id.* § 744 *et seq.*

In the case already cited from the supreme court, Mr. Justice DANIEL, in his dissenting opinion, considers more at large than does the opinion of the court, the distinctions between the action against a carrier *ex delicto* and *ex contractu*. So do the concurring Justices CATRON and WOODBURY, and the general result of that very instructive case on this subject is that, notwithstanding there was in that case, yet, in a large sense, a suit founded upon a special contract of carriage, in the very nature of the action it was such that, essentially, whatever its form, it was "*founded in tort*," and would, therefore, support the jurisdiction of the admiralty. The majority opinion thought the jurisdiction existed even if "*founded on the contract*," but the two concurring justices above named preferred to rest it on the foundation of tort. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 344, 394, 410, 427. I forbear to quote much of these opinions that would be applicable here, and refer to another case where the same rules of discrimination there adopted were applied in testing the form of action, but with an inverse result.

In *Bryant v. Herbert*, 3 C. P. Div. 189, the question was whether the action of *detinue* is "*founded on contract*" or "*founded on tort*," and as one ground of the judgment it was held that although in form the action is one for a wrong done, in theory it is founded on a contract, and not on a wrong independently of contract. These two cases establish that in solving a question like this we are to look to the requisite nature of the remedy the plaintiff is entitled to on the facts he states, rather than any form his declaration may assume, though, of course, we cannot wholly disregard the form of the declaration.

Now, if this matter was before one of so much difficulty, there has been only an increase of it since our statutes abolished all forms of action. Like the distinctions between law and equity, it may be doubtful if it is possible to wholly obliterate those between contract and tort, they do so inhere in the very bone and flesh of our law; and certainly the legislators have not always furnished us with a legislative substitute for those which they have destroyed, nor yet have they destroyed the whole, as this case well illustrates. Perhaps ours did not think, when they required proof of any instrument of writing upon which "*the action is founded*," how the statute abolishing all forms of action had removed the surest guide we had,—the *indicia* of the common-law forms, namely,—to discover whether a plaintiff, when he brings his suit, *elects* to bring it on the bill of lading, or on "*the custom of the realm*;" for, after all, in a case like this, we are searching for that election, pure and simple, and nothing else. Perhaps in some cases the pleader does not know or care, and in fact

makes no election whatever, since he may do either, or both, or neither, under our Code. Thus:

"Whenever the facts of the case entitle the plaintiff to sue for a breach of contract, or, at his election, for the wrong and injury, he may join statements of his cause of action in both forms, or either." And "all wrongs and injuries to the property and person in which money only is demanded as damages may be redressed by an action *on the facts of the case*." Tenn. Code, §§ 2747, 2748, 2884, 2894, 2896.

Besides, the Code gives us a form of declaration "against a common carrier," as follows:

"The plaintiff sues the defendant for ——— dollars as damages for the failure to deliver certain goods in good condition, viz., [describing them,] received by him as a common carrier, to be delivered to the plaintiff at ———, for a reward, which he delivered damaged." Tenn. Code, § 2939, No. 13; Caruth. Hist. Suit, 146.

The plaintiff here does not use this form, which makes no profer^t of any bill of lading, or refers to any contract, but sues on "*the facts of the case*." How is it possible under this legislation for the "astutest judges" to tell whether the action is on the contract or the wrong; or, rather, whether the pleader uses the one or the other, or both, in his wholly informal count "on the facts?" It is not, and the best that can be done is to take the plaintiff's word for it; and when his counsel says in his argument and brief that he sues in tort, to hold him to that form of action and its consequences. Fortunately, however, we are not left wholly to this solution of the difficulty. It has been decided that the averment of a promise does not make the declaration one in contract, nor the use of the words "agreed," "undertook," or "promised." Hutch. Carr. 744; *Smith v. Seward*, 3 Pa. St. 342; *Corbett v. Packington*, 6 Barn. & C. (13 E. C. L.) 268. These cases say the averment must be one of a promise, and a consideration for it, to make it a count on contract; but there may be an averment of a consideration or compensation for assuming the duty imposed by law, or a consideration connected with a contract pleaded only as an inducement. All the cases show this, unless the consideration averred is for a promise to do something beyond the common-law duty, as was the fact in the case last cited.

Here there is no averment of a contract beyond the common-law duty as contained in the bill of lading or consideration for such a promise. They have also abolished forms of action in England, and have a statute analogous to this, giving costs only on certain conditions when the action is "founded on contract," and only on certain other conditions when it is "founded in tort." In a series of cases under that statute the question whether in a given declaration the plaintiff has elected to sue on contract or tort has been gone over, with some conflict of opinion. While they leave the matter still in doubt, and evidently, as Mr. Schouler says, indicate a desire to narrow the plaintiff's election, if possible, they come at last to the rule already indicated in the decision I have cited from the supreme court

of the United States in determining the admiralty jurisdiction, and suggested by Mr. Hutchinson, that the innate and habitual form of action on the ordinary contract for carriage, for a breach of the duty to keep the goods safely without loss by negligence, is "founded in tort," and the declaration will be so construed unless the special features of the case show it to have been "founded in contract." Schouler, Bailm. 558, note 1; Hutch. Carr. §§ 747, 748, 749; *Tattan v. Great Western R. Co.* 2 El. & El. (105 E. C. L.) 844; *Baylis v. Lintott*, 8 C. P. 345; *Pontifex v. Midland R. Co.* 3 Q. B. Div. 23; *Fleming v. Manchester, etc. Ry. Co.* 4 Q. B. Div. 81; *Bryant v. Herbert*, 3 C. P. Div. 189; *Foulkes v. Metropolitan Ry. Co.* 4 C. P. Div. 267, 278; 2 Chit. Pl. 651, 667; Oliv. Prec. 371.

Examined in the light of these authorities, this declaration must be taken to have expressed the election of the plaintiff to bring an action "founded in tort," and therefore not to be an "action founded" upon the bill of lading. Because (1) it is a joint action against the demurrant, and other defendants who are not alleged to have joined in the bill of lading. (2) The plaintiff does not make profert of the bill of lading; and, if this should seem to beg the question, it should be remembered that our inquiry is a peculiar one in this connection, being limited to determining whether the plaintiff has, *in fact*, elected to sue in tort, or on the contract contained in the instrument; therefore, we may look to this want of profert as a circumstance to show his state of mind. Hutch. Carr. § 749, last clause. (3) The count seems to aver an agreement not alleged to be in writing,—whether as an inducement or otherwise is immaterial, since it is not within the statute requiring profert,—disconnected with the bill of lading. *Carroway v. Anderson*, 1 Humph. 61. (4) The allegations about the bill of lading seem to be made by way of inducement to the general cause of action, and not as to the foundation of it. (5) The breaches alleged seem to be of a joint "agreement," other than that of the demurrant by the bill of lading. (6) Naturally, the action would be in tort rather than contract. Hutch. Carr. §§ 747, 748.

Moreover, the plaintiff, by resisting this demurrer, and not amending to offer profert, as it might at will, indicates an election to proceed in tort, and not upon the bill of lading. Inferentially, this count "on the facts" was drawn with that intent; but if it was not so drawn, in fact, I know of no rule of law, presented as this question is here presented, and within the narrow limits prescribed by the inquiry we are making, why the plaintiff might not now or at the trial elect to proceed in tort. If it had sued in contract and made profert, it might amend and proceed in tort; and why may it not so treat an ambiguous declaration, if this be of that character?

Demurrer overruled.

BARNEY v. CHAPMAN.

(Circuit Court, N. D. Illinois. October, 1884.)

PRACTICE—CA. SA.—EMBEZZLEMENT—ILL. REV. ST. CH. 77, §§ 5, 62—ACTION EX CONTRACTU.

Where a plaintiff waives the tort and sues by action in form *ex contractu* to recover money wrongfully converted to his own use by defendant, and the record shows that a tort has been actually committed, he is entitled, under the Illinois statute, to a *ca. sa.* or execution against the body of defendant, notwithstanding the form of action adopted.

Motion to Quash *ca. sa.**E. F. Bull*, for plaintiff.*C. Bentley*, for defendant.

BLODGETT, J. This is a motion to quash a *ca. sa.* issued against the defendant, and by which he is now under arrest, in custody of the marshal of this district. This *ca. sa.* is issued on a judgment rendered March 27, 1880, for \$14,000 and costs. The motion is predicated upon the ground that no execution was issued upon this judgment against the property of the defendant prior to the issue of the *ca. sa.*, and no demand was made that he surrender his property in satisfaction of the judgment, and also that no affidavit of the issuing of the execution and the demand for the surrender of property under it, and charging defendant with fraud in withholding or concealing his property, was made prior to the issue of the *ca. sa.* The plaintiff, in answer to the motion, says the record shows this was not such a case as required the preliminary issue of an execution or the filing of an affidavit before a *ca. sa.* could issue, and that, therefore, the affidavit, which was in fact filed before the issue of the *ca. sa.*, but did not show the issue of an execution and demand for surrender of property under it, was entirely unnecessary, and that the plaintiff had a right to the *ca. sa.* in the first instance. Section 5, c. 77, Rev. St., reads as follows:

"No execution shall issue against the body of a defendant except when a judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum*, as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors."

The fair construction of this section, I think, is this: There are three cases made in which a *ca. sa.* or execution against the body may issue: *First*, where the judgment is rendered for a tort committed by the defendant; *second*, where the defendant shall have been held to bail on a *capias ad respondendum*; and, *third*, where he shall have refused to deliver up his estate for the benefit of his creditors. And section 62 of the same chapter provides specifically for the last case, where an execution shall have been issued on a judgment and demand made for the surrender of the property of the defendant on execution, and a refusal when an affidavit shall be filed

setting forth these facts, and also that the defendant has property with which to satisfy the execution which he unjustly refuses to surrender, or has conveyed or concealed the same with intent to defraud his creditors, etc. Then a *ca. sa.* may issue upon an order of the judge of the court in which the judgment was rendered; that is, facts showing fraud must be set out in the affidavit to the satisfaction of the judge or other officer whose duty it is to order a *ca. sa.* in a proper case made out. The cause of action shown by the record in this case is, briefly, that defendant was an agent of the United States Express Company at La Salle, in this state, and that, as such agent, a package containing \$14,000 came into his hands to be delivered to the Mathesen & Ziegler Zinc Company, at that place, and that instead of so delivering said money to the consignee, defendant converted the same to his own use. The declaration contains two counts somewhat varying the allegations, but the substance of the declaration was as I have stated.

The action is in form *ex contractu*. The plea was the general issue, upon which issue was joined, and upon trial before a jury a verdict was found in favor of the plaintiff. We may therefore say that the defendant stands upon the records of the case as convicted of the charge of having converted plaintiff's money to his own use. The issue so made has been tried by a jury, defendant found guilty, and judgment rendered. While the action is in form *ex contractu*, the *gravamen* and gist of the action is a tort clearly set out by the averments in the declaration, and the only question is whether the plaintiff has waived the right of proceeding in the first instance against the body of the defendant by having brought this action in form *ex contractu*. In a case such as is made by this declaration, the right to sue in form *ex contractu* arises from the principle that the law will presume a promise by the defendant to pay to the plaintiff any money he may have, belonging to the plaintiff, which he ought not in conscience to retain; but the allegation of a promise to pay by the defendant is a pure fiction; the right of action arises from the tort stated, and not from the promise averred. The language of the statute is: "No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant." It does not say the plaintiff must necessarily pursue the form of an *ex delicto* action in order to entitle him to an execution against the body of the defendant, if it appears on the record, and has been adjudged against him, that the real right of action was for a tort committed by the defendant.

It seems to me that the record in this case shows the judgment to have been rendered for a tort committed by the defendant, and that no issue of execution and demand of property thereon, and affidavit showing fraud, were necessary as conditions precedent to the issue of the *ca. sa.* The court can see, from an inspection of the record, that a wrong has been committed, that an embezzlement has been perpe-

trated, that entitled the plaintiff to the remedies in case of tort. It seems to me, therefore, that plaintiff having brought his suit in form *ex contractu*, does not deprive him of the process on his judgment which the law says he is entitled to for a tort committed by the defendant.

The motion to quash is overruled.

THE CITIZENSHIP OF A PERSON BORN IN THE UNITED STATES OF CHINESE PARENTS.

In re LOOK TIN SING, on *Habeas Corpus*.

(Circuit Court, D. California. September 29, 1884.)

1. CITIZENSHIP OF PERSONS BORN IN THE UNITED STATES OF CHINESE PARENTS.
A person born within the United States, of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the emperor of China, is a citizen of the United States.

2. CONSTRUCTION OF WORDS "SUBJECT TO JURISDICTION THEREOF," IN FIRST CLAUSE OF SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Persons are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, with the consequent obligation to obey them when obedience can be rendered; but only those who are thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must, at the time, be both actual and exclusive. Persons excepted from citizenship, notwithstanding their birth or naturalization in the United States.

3. ORIGIN OF THE CLAUSE IN THE AMENDMENT DECLARING WHO ARE CITIZENS OF THE UNITED STATES.

Previous to this amendment the general doctrine, except as applied to Africans brought here and sold as slaves, and their descendants, was that birth within the dominions and jurisdiction of the United States of itself created citizenship. The amendment was adopted as an authoritative declaration of this doctrine as to the white race, and also to do away with the exception as to Africans and their descendants.

4. THE RESTRICTION ACTS NOT APPLICABLE TO CITIZENS.

The acts of congress of 1882 and 1884, restricting the immigration of Chinese laborers to the United States, are not applicable to citizens of the United States, though of Chinese parentage. No citizen can be excluded from the United States except in punishment for crime.

On Habeas Corpus.

T. D. Riordan and William M. Stewart, for petitioner.

S. G. Hilborn, U. S. Atty., Carroll Cook, Asst. U. S. Atty., and John N. Pomeroy, for the United States.

Before FIELD, Justice, and SAWYER and SABIN, JJ.¹

FIELD, Justice. The petitioner belongs to the Chinese race, but he was born in Mendocino, in the state of California, in 1870. In 1879

¹ Judge HOFFMAN did not sit on the hearing of this case, but he was on the bench when the opinion was delivered, and concurred in the views expressed.

he went to China, and returned to the port of San Francisco during the present month, (September, 1884,) and now seeks to land, claiming the right to do so as a natural-born citizen of the United States. It is admitted by an agreed statement of facts that his parents are now residing in Mendocino, in California, and have resided there for the last 20 years; that they are of the Chinese race, and have always been subjects of the emperor of China; that his father sent the petitioner to China, but with the intention that he should return to this country; that the father is a merchant at Mendocino, and is not here in any diplomatic or other official capacity under the emperor of China. The petitioner is without any certificate under the act of 1882 or of 1884, and the district attorney of the United States, intervening for the government, objects to his landing for the want of such certificate.

The first section of the fourteenth amendment to the constitution declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." This language would seem to be sufficiently broad to cover the case of the petitioner. He is a person born in the United States. Any doubt on the subject, if there can be any, must arise out of the words "*subject to the jurisdiction thereof.*" They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must, at the time, be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This ex-territoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. Persons born on a public vessel of a foreign country, while within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States. The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognize the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence

and separation from the British crown, as belonging to every human being,—God-given and inalienable,—the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial *dicta* that a citizen cannot renounce his allegiance to the United States without the permission of the government under regulations prescribed by law; and this would seem to have been the opinion of Chancellor KENT when he published his Commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government; and we adopt as citizens those belonging to our race who, coming from other lands, manifest attachment to our institutions, and desire to be incorporated with us. So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that, as soon as they are naturalized, they are deemed entitled with the native-born to all the protection which the government can extend to them, wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here, is accorded to them as well as to the native-born, to transfer their allegiance from our government to that of other states.

In an opinion of Atty. Gen. Black, in the case of a native Bavarian, who came to this country, and, after being naturalized, returned to Bavaria, and desired to resume his *status* as a Bavarian, this doctrine is maintained. "There is," he says, "no statute or other law of the United States which prevents either a native or naturalized citizen from severing his political connection with this government, if he sees proper to do so in time of peace, and for a purpose not directly injurious to the interests of the country. There is no mode of renunciation prescribed. In my opinion, if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States, and I do not think we could or would afterwards claim from him any of the duties of a citizen." 9 Op. Attys. Gen. 62. The doctrine thus stated has long been received in the United States as a settled rule of public law; and in the treaty of 1868, between China and this country, the right of man to change his home and allegiance is recognized as "inherent and inalienable." 16 St. p. 740, art. 5. And in the recital of an act of congress, passed nearly at the same time with the signing of the treaty, this right is assumed to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and in the body of the act, "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or ques-

tions the right of expatriation" is declared to be "inconsistent with the fundamental principles" of our government. 13 St. 223; Rev. St. § 1999.¹ So, therefore, if persons born or naturalized in the United States have removed from the country, and renounced, in any of the ordinary modes of renunciation, their citizenship, they thenceforth cease to be subject to the jurisdiction of the United States.²

With this explanation of the meaning of the words in the fourteenth amendment, "subject to the jurisdiction thereof," it is evident that they do not exclude the petitioner from being a citizen. He is not within any of the classes of persons excepted from citizenship, and

¹The treaty was signed on the twenty-eighth of July, 1868. The following act of congress was approved the twenty-seventh of the same month:

CHAPTER CCXLIX.—*An Act Concerning the Rights of American Citizens in Foreign States.*

Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle this government has freely received emigrants from all nations and invested them with the rights of citizenship; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas, it is necessary, to the maintenance of public peace, that this claim of foreign allegiance should be promptly and finally disavowed; therefore,—

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this government.

Sec. 2. And be it further enacted, that all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

Sec. 3. And be it further enacted, that whenever it shall be made known to the president that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the president forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful, and in violation of the rights of American citizenship, the president shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the president to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall, as soon as practicable, be communicated by the president to congress.

Approved July 27, 1868.

The provisions of this statute are re-enacted in the Revised Statutes, in sections 1999, 2000, and 2001.

²Many other cases might be mentioned where persons would not be citizens, though born in the country. Thus, as Kent says: "If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad and occupying a foreign country are deemed to be born in the allegiance of the sovereign to whom the army belongs." 2 Comm. 42. By allegiance, as thus used, is meant the duty of obedience to the government or sovereign under which the children live for the protection they receive. But while they are in their infancy they cannot, of course, perform that duty, and its performance must necessarily be respite until they arrive at the years of discretion and responsibility. They then owe obedience, not only for the protection then enjoyed, but, as observed

the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country.

The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country, so far as the white race is concerned, but also to overrule the doctrine of the *Dred Scott Case*, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States, nor capable of becoming such. 19 How. 393. The clause changed the entire *status* of these people. It lifted them from their condition of mere freedmen, and conferred upon them, equally with all other native-born, the rights of citizenship. When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws. So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the *status* of either as citizens under the amendment in question.

Independently of the constitutional provision, it has always been the doctrine of this country, except as applied to Africans brought here and sold as slaves, and their descendants, that birth within the dominions and jurisdiction of the United States of itself creates citizenship. This subject was elaborately considered by Assistant Vice-chancellor SANDFORD in *Lynch v. Clarke*, found in the first volume of his reports. [1 Sandf. 583.] In that case one Julia Lynch, born in New York in 1819, of alien parents, during their temporary sojourn in that city, returned with them the same year to their native country, and always resided there afterwards. It was held that she was a citizen of the United States. After an exhaustive examination of the law, the vice-chancellor said that he entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen; and added that this was the general understanding of the legal profession, and the universal impression of the public mind. In illustration of this general understanding he mentions the fact that when at an election an inquiry is made whether the person offering to vote is a citizen or an alien, if he answers that he is a native of this country the answer is received as conclusive that he is a citizen;

by Judge WILSON, for that which they have received from their birth. 1 Wils. Works, 313. By being born within the allegiance of a government is only meant being born within the protection of its laws, with a consequent obligation to obey them when obedience can be rendered. So, also, as to members of the Indian tribes within the limits of the United States. These tribes are independent political communities, retaining, in many respects, the right of self-government, notwithstanding they are under the protecting power of the United States; and a member thereof, though born in the country, is not, by his birth, a citizen of the United States, under the fourteenth amendment. He is not born under their actual and exclusive jurisdiction, which the amendment contemplates. *McKay v. Campbell*, 2 Sawy. 118; *U. S. v. Osborne*, 6 Sawy. 406; *Worcester v. Georgia*, 6 Pet. 515.

that no one inquires further; no one asks whether his parents were citizens or foreigners. It is enough that he was born here, whatever was the *status* of his parents. He shows, also, that legislative expositions on the subject speak but one language, and he cites to that effect not only the laws of the United States, but the statutes of a great number of the states, and establishes conclusively that there is on this subject a concurrence of legislative declaration with judicial opinion, and that both accord with the general understanding of the profession and of the public.¹

Whether it be possible for an alien who could be naturalized under our laws to renounce for his children while under the age of majority the right of citizenship, which, by those laws, he could acquire for them, it is unnecessary to consider, as no such question is presented here. Nor is the further question before us whether, if he cannot become a citizen, he can, by his act, release any right conferred upon them by the constitution.

As to the position of the district attorney, that the restriction act prevents the re-entry of the petitioner into the United States, even if he be a citizen, only a word is necessary. The petitioner is the son of a merchant, and not a laborer, within the meaning of the act. Being a citizen, the law could not intend that he should ever look to the government of a foreign country for permission to return to the United States,² and no citizen can be excluded from this country ex-

¹In 1855 congress passed the following act, securing citizenship to children of citizens of the United States born without their limits:

CHAPTER LXXI.—*An Act to Secure the Right of Citizenship to Children of Citizens of the United States Born out of the Limits thereof.*

Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be, at the time of their birth, citizens of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States: provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

Sec. 2. And be it further enacted, that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen.

Approved February 10, 1855.

The provisions of this statute are re-enacted in the Revised Statutes, in sections 1993 and 1994.

²The restriction act of congress of July 5, 1884, amending the act of May 6, 1882, "to execute certain treaty stipulations relating to Chinese," provides that every Chinese person other than a laborer entitled to enter the United States, under the treaty between our government and China, or under that act, shall obtain from the Chinese government, or the government of which he is a subject, its permission to come within the United States, authenticated by its certificate, containing various particulars of himself and family so as to clearly identify him; and while such certificate is only *prima facie* evidence against our government, it is made the sole evidence permissible on the part of the person producing it to establish his right of entry into the United States. Chapter 220, § 6, St. 1883-84, p. 115.

cept in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress. The petitioner must be allowed to land; and it is so ordered.

HANCOCK INSPIRATOR Co. v. JENKS.

(Circuit Court, E. D. Michigan. February 11, 1884.)

1. PATENTS FOR INVENTIONS—AMENDED APPLICATION—VERIFICATION—ACT OF 1836.

Where a patent, issued on a supplementary or amended application, under the act of 1836, upon its face recites that "the patentee has made oath to his application," this recital, in the absence of fraud, is conclusive evidence, in a suit against an infringer, that the necessary oath was taken by the applicant before letters patent were granted.

2. SAME—COMBINATION—CLAIMS.

The claims for a combination patent need not include any elements except such as are essential to the peculiar combination and are affected by the invention.

3. SAME—CONSTRUCTION OF CLAIMS.

While a patentee is limited by his claims, courts are allowed to look at the detailed specifications, models, or drawings, for the purpose of construing such claims.

4. SAME—UTILITY OF DEVICE—INFRINGEMENT.

In a suit for infringement, that plaintiff's device is a useful one is sufficiently shown by the fact that, with other devices open to him, defendant prefers to use the mechanism patented by plaintiff.

5. SAME—HANCOCK BOILER INJECTOR—PATENTABILITY—ANTICIPATION—INFRINGEMENT.

Letters patent No. 86,152, granted January 26, 1869, to John T. Hancock, for an improvement in boiler injectors, construed, and *held*, that the device therein described was a patentable invention, not anticipated by prior devices, and that the first and second claims thereof are infringed by the "duplex injectors" manufactured, sold, and used by defendant.

Per BROWN, J.

6. SAME—REHEARING—RUE PATENT.

On rehearing, and comparison of the Hancock and Rue patents, *held*, that the latter did not anticipate the Hancock injector.

Per MATTHEWS, Justice; BROWN, J., concurring.

In Equity.

This was a bill to recover damages for an infringement of letters patent No. 86,152, dated January 26, 1869, to John T. Hancock, for an improvement in boiler injectors. The bill recited, in the usual form, the grant of letters patent, the introduction into general use of the patented device, both by the patentee and the plaintiff, the assignment of the patent to the plaintiff, the infringement of the same by the defendant in the manufacture, sale, and use of "duplex injectors," so called, and prayed for an account, a decree for profits and damages, and for an injunction. The answer denied, for various

reasons, the validity of the plaintiff's patent, and also the infringement by the defendant.

Elmer P. Howe and Chauncey Smith, for plaintiff.

T. S. Sprague, for defendant.

Brown, J. The main object of all boiler injectors is to raise water by means of a vacuum, created by the condensation of steam, and to force the water so raised into the boiler from which the steam originally issued. The general construction of all these devices is much the same. The principal features of each are common to all. They consist of an upright tube, through which the water is raised into a chamber at the top, in which a vacuum is created; a second tube at right angles to the first, provided with a conical nozzle of small diameter, through which the steam is driven with great velocity against the water rising from the first tube. The effect of the steam-jet is—*First*, to produce a vacuum in the chamber, about the nozzle, which is filled by the uprising water; and, *second*, to drive this water into the boiler. In so doing it is itself condensed, and returns with the water to the boiler, from which it issued. The success of these devices is dependent very largely upon the separation, as far as possible, of the water and steam up to the very point where they come in actual contact. The maximum of efficiency is attained when the jet of steam retains the same temperature which it had when it issued from the boiler, and when the water to be acted upon is as cool as possible. The pressure, and consequently the velocity, of the propelling jet of steam is then at its maximum. In both injectors and ejectors, which differ from each other mainly in the use to which they are put, and not materially in their construction, the jets may be reversed; that is, the steam may take the place of the water in the annular chamber, and a jet of water be propelled through the conical nozzle. In all devices prior to the plaintiff's, the water was allowed to circulate for a greater or less distance about the nozzle through which the steam rushed. The effect of this was twofold: *First*, to cool the steam somewhat before it left the nozzle, and thereby diminish its velocity; and, *second*, to heat the water, and thereby diminish its condensing power after it came in actual contact with the steam. To remedy this defect was the object of Hancock's invention, which consists principally in substituting, for the conical nozzle ordinarily used, a plate or plug with an orifice, and some other trifling changes incidental thereto. In the specifications the device is described as follows:

"In the drawings, A A represent a cylinder, with induction pipe, B, at right angles with A, the pipe, B, being connected with the source of power. C is a concentric tube, smaller than A, which is placed within, and firmly attached at one end to A. The bore of this tube, C, is conical from *d* to *e* and from *d* to *g*. E is a plug closely fitted into A at the end opposite C. This plug has a central, conical orifice, K, which presents an area at its inner face similar in size to the area of tube, C, at *d*. This plug is provided on its inner face with the annular recess, *n, n*, thus providing a passage-way for the motor

to the bore of tube, C. The face of tube, C, at *e* is in the same plane with the edge of orifice, K, in plug, E, or nearly so. When the plug, E, is in position in cylinder, A, as shown, the annular recess, *n, n*, on its face becomes a continuation of the space, *m, m*, which surrounds tube, C."

The claims of the inventor are:

(1) The combination of plug, E, with orifice, K, and the tube, C, with the chamber, *e d*, when they are located relatively to each other, substantially as described; (2) the plug, E, with orifice, K, and tube, C, with the chamber, *e d*, and chamber, *d g*, as described; (3) the combination, with the above, of the tube, D, substantially as described.

Defendant is charged with infringing the first two claims.

A preliminary objection was taken to the validity of the patent, upon the ground that it appeared from the records of the patent-office that the supplementary or amended application upon which the patent was granted was verified, not by the oath of the patentee, but by that of his attorney. Section 6 of the act of 1836, under which this patent was granted, provides that the patentee shall deliver a written description of his invention or discovery in full, clear, and exact terms, and shall particularly specify and point out the improvement which he claims as his own invention or discovery. The descriptions and drawings shall be signed by the inventor and attested by two witnesses. The same section also requires that the applicant shall make oath that he does verily believe himself to be the first inventor or discoverer of the art, machine, composition, or improvement for which he solicits the patent. It has apparently become the practice for an attorney acting for the inventor, if the claims of the latter are rejected from any cause by the commissioner, to examine the case in view of the reasons given for such objection, and amend the specifications and claims without the knowledge of the inventor, and request a re-examination. The seventh section of the same act, after defining the duty of the commissioner in case he rejects an application, enacts that "if the applicant, in such case, shall persist in his claims for a patent, with or without any alteration in his specification, he shall be required to make oath or affirmation anew, in manner as aforesaid." It is argued in this connection that all these mandatory provisions of the act must be complied with before the commissioner of patents can take jurisdiction in the case. But conceding that the commissioner has no authority to receive the oath of the attorney to the supplementary application, there are two answers to the proposition that the patent is thereby rendered void:

(1) There is nothing in the act requiring this oath to be in writing, and, notwithstanding the existence of the supplementary application, verified by the attorney, it is possible that the patentee appeared personally before the commissioner and made the requisite oath in his presence. The commissioner, having general jurisdiction of the subject, is presumed to have complied with all the requirements of the law before issuing the patent. Indeed, the courts have gone so far as to

hold that the presence in the files of the patent-office of a paper purporting to be an oath, but void for want of a jurat, will not defeat the patent. Walker, Pat. § 122; *Crompton v. Belknap Mills*, 3 Fisher, 536; *Hoe v. Kahler*, 12 FED. REP. 117. (2) We have always understood that the judgment of a court having jurisdiction of the parties and of the subject-matter, or the decision of an officer acting judicially, could not be impeached collaterally by showing that such judgment was rendered or judicial act performed upon insufficient testimony, or was even procured by fraud and perjury. So far as this principle is applied to the judgments of a court of record the authorities are very numerous. Freem. Judgm. §§ 334-338; Big. Estop. 145, 151; *Simms v. Slacum*, 3 Cranch, 300; *Ammidon v. Smith*, 1 Wheat. 447; *Smith v. Lewis*, 3 Johns. 157; *Marriott v. Hampton*, 7 Term R. 269; *Michaels v. Post*, 21 Wall. 398. It is scarcely less frequently applied to the action of a public officer exercising judicial functions, as in granting patents. *Abbott v. Bahr*, 3 Chand. (Wis.) 193; *Jackson v. Lawton*, 10 Johns. 23; *Rubber Co. v. Goodyear*, 9 Wall. 789.

But we think that further discussion of this proposition is rendered unnecessary by the opinion of the supreme court in *Seymour v. Osborne*, 11 Wall. 516, 539. In this case it was claimed that the patent was void because the patentees did not make oath, before the patent was granted, that they did verily believe that they were the original and first inventors of the improvements for which the patent was solicited. The court treated the requirements of the law with regard to the delivering of the written description of the invention, and of the manner and process of making, constructing, and using the same, as conditions precedent to the right of the commissioner to grant the application, as they must appear on the face of the patent, and are always open to legal construction as to their sufficiency. The same remark was made with regard to the drawings and models; and the further requirement that the inventor shall make oath that he is the original and first inventor, etc. But Mr. Justice CLIFFORD winds up this branch of the case by observing "that extended examination of the question, however, is unnecessary, as every one of the letters patent on which the suit is founded contains the recital that the required oath was taken before the same was granted; and the court is of opinion that those recitals, in the absence of fraud, are conclusive evidence that the necessary oaths were taken by the applicants before the letters patent were granted." Now, in the case under consideration, the patent upon its face recites that "the patentee has made oath to his application;" and we are clearly of the opinion that we are not at liberty to inquire into the truth of this statement in a suit against an infringer.

In the case of *Childs v. Adams*, 1 Fisher, 189, the bill itself recited the fact that the patentee, who was an alien, had falsely represented himself as a citizen in order to obtain a patent. Eight years after-

wards he surrendered the patent, and made oath that he was a citizen of France, and obtained a reissue which recited that the original patent was granted to him upon his belief that he was a citizen of the United States, which belief arose from ignorance of the laws of the United States. As the defect in the jurisdiction of the commissioner was thus brought directly before the court upon the plaintiff's own allegation in the bill, of course the court could not avoid taking judicial notice of the fact that the commissioner had no authority to grant the original patent, because of the false suggestion, and of the reissue, because of want of power in the commissioner to grant it eight years after the invention had been in public use.

In *Eagleton Manuf'g Co. v. West, etc., Manuf'g Co.* 2 FED. REP. 774, the patentee died after his original application was made; but he authorized his attorneys to amend the application. At his death their authority ended. They made the amendments in his name without any authority in fact, when the amendment should have been made by his administratrix. This, apparently, appeared upon the face of the patent, and it was held to be fatal. We do not think this case in point, as plaintiff's patent is entirely regular upon its face.

The next objection taken to the Hancock patent is that the claims are for mere aggregations of elements, which, by themselves, perform no duty or functions; that they must of necessity, to compel them to operate or perform any functions of an injector or ejector, be combined and arranged with something else besides the elements named as being combined in either of the claims. In the examination of defendant's expert, he gives it as his opinion that the combination would not be operative for any use or purpose without the addition to them of an induction tube and a chamber to inclose the tube, C. Now, while it is entirely true that the combination stated in these claims would be obviously inoperative without such induction tube and chamber, still, by adding these elements, the construction would be equally inoperative without a boiler to furnish the steam and a well to supply the water, and a pipe leading to and from the boiler. But, in drawing the claims for a combination patent, we do not understand it to be necessary to include any elements except such as are essential to the peculiar combination, and are affected by the invention. Other portions of the machine are usually shown in the drawings to exhibit their relation to the patented combination, and they are wholly unnecessary to the validity of the claims. Indeed, it is manifest that the more elements introduced into the combination, the easier it would be to evade the patent; since, to sustain a suit for infringing a combination, it must be made to appear that the defendant used every element of such combination, however immaterial it may be. *Vance v. Campbell*, 1 Black, 429.

In this patent the patentee has claimed all that he has invented, and if he had added more it would have been something which was

already well known and necessary to its operation, and therefore implied in his claim. While, as observed by Judge BLODGETT in *Dennis v. Cross*, 6 Fisher, 138, 141, "probably no principle of patent law is better settled than that the patentee is limited by his claim;" courts are allowed to look at the detailed specifications, models, or drawings for the purpose of construing such claims.

In *Forbush v. Cook*, 2 Fisher, 668, it is said by Mr. Justice CURTIS that "it is not requisite to include in the claim for a combination, as elements thereof, all parts of the machine which are necessary to its action, save as they may be understood as entering into the mode of combining and arranging the elements of the combination." So, in *Loom Co. v. Higgins*, 105 U. S. 580, it was held that, if an improvement of a well-known appendage to a machine is fully described in a specification, it is not necessary to show the ordinary modes of attaching the appendage to the machine. The letters patent are to be read as if the machine and its appendage were present, or in the mind of the reader, and he is a person skilled in the art. "If a mechanical engineer invents an improvement on any of the appendages of a steam-engine, such as the valve-gear, the condenser, the steam-chest, the walking-beam, the parallel motion, or what not, he is not obliged, in order to make himself understood, to describe the engine, nor the particular appendage to which the improvement refers, nor its mode of connection with the principal machine."

It is usual in the drawings to show the relations of the patented combinations to the other portions of the machinery, but the patentee is not obliged and ought not to claim anything more than such portions of the combinations as are essentially a part of his invention.

We are satisfied, too, that this combination, slight as its apparent departure from other devices is, involves an exercise of the inventive faculty. It consists in substituting, for the ordinary nozzle used in injectors, a plate with an orifice, K, designed to project into the steam-chamber, but not sufficiently far to allow the temperature of either the water or steam to be perceptibly affected either by the other before they meet at the mouth of the combining tube; and in this particular it is obviously different from, if not more valuable than, the other patents which are claimed as anticipations. In the Giffard patent the projection of the nozzle into the chamber is about one and a quarter inches, in the Barclay patent one inch, and in the Rue patent five-eighths of an inch, while in the Hancock patent it is less than one-sixteenth of an inch. This result is obtained by a construction so different from that adopted in prior devices, that we consider it to be patentable. We think, too, by reference to the drawings, this peculiarity of construction of the plug, E, is made sufficiently manifest to support the claim in the language in which it is couched.

There are numerous patents set up as anticipations of the plaintiff's, but the steam-nozzle used in the original Giffard patent, or some other similar device which permits the circulation of water about the

steam-jet, is an element in all, and in that respect they fail to accomplish what is claimed for the plaintiff's patent. Undoubtedly the field upon which Hancock was experimenting to produce his device was, considering the existing state of the art, a pretty narrow one.

All of the prior devices contained nozzles which closely corresponded with the plug, E, and its orifice, A, a chamber, a combining tube with two conical frustrums, and had it not been for the new result produced, it would be difficult to avoid the conclusion that Hancock had been anticipated by prior patents; in other words, that his device was nothing more than a mechanical variation. But that the result he produced was a valuable one is evident from the Barclay patent, wherein the patentee surrounds his steam nozzle by an envelope or casing, leaving a free space between the outside of the nozzle and its casing, which may be filled with any non-conducting substance. In his specifications, Barclay states the object of surrounding the steam-nozzle with its non-conductor of heat is to maintain a high temperature of the steam until it reaches the exit from its nozzle, as "priming" (by which we understand the condensation of steam) is very injurious whilst forming the vacuum. In all the other devices the water and steam were carried parallel to each other for some distance before coming in contact, and thereby the steam was perceptibly cooled and its injecting force weakened, while in the Hancock patent the steam and water approach each other from opposite directions up to a point only one-sixteenth of an inch from the point of actual contact, so that neither has any perceptible effect upon the other until the union takes place.

That the duplex injector used by the defendant is an infringement of the Hancock patent is apparent upon the most casual inspection, and indeed is scarcely denied by the defendant himself. It is, in fact, a duplication of the plaintiff's invention, and consists of an ejector or lifting apparatus, which, by the action of a jet of steam, raises the water from its reservoir, and, after discharging it into the combining tube, delivers it to a second apparatus at right angles to the first, by which it is injected into the boiler. The construction of the injector and the ejector is substantially the same, and each is evidently taken from the plaintiff's patent. The only perceptible differences between them are that the lower surface of the plug, E, is in this device somewhat more recessed than in the Hancock patent, and that the diameter of the combining tube at its throat, d, is not exactly similar in size to the inner diameter of orifice, K. These changes are quite immaterial; indeed, they are probably accidental. The orifice, K, in this device is also made considerably longer than in the plaintiff's patent; but that does not seem to affect in any way the separation of the inflowing steam and water before they reach the combining tube, which is the essence of the Hancock patent.

That the plaintiff's device is a useful one is sufficiently apparent from the fact that, with other devices open to him, the defendant

prefers to use the mechanism patented by the plaintiff. *Smith v. Glendale, etc., Co.* 1 Holmes, 340; *Lehnbeuter v. Holthaus*, 105 U. S. 94.

Upon the whole we are clearly of the opinion that plaintiff is entitled to a decree for an injunction, and for a reference to a master to assess its damages.

OPINION AFTER REHEARING.

(June 25, 1884.)

MATTHEWS, Justice, (*orally*.) In the matter that was argued before us yesterday, *Hancock Inspirator Co. v. Jenks*, we are prepared to dispose of the application, made by the defendant in the original suit, upon a single point arising in the progress of the cause, involving a comparison between the patent sued upon, of Hancock, and a patent which it was thought had anticipated it, called the Rue patent. The order granting the rehearing confined the argument to the issue raised by the motion, viz.: that the court, in its former opinion, was in error as to the construction and mode of operation of the patent of Samuel Rue, dated September 1, 1868; that said patent was an anticipation of plaintiff's patent; and that plaintiff's patent was void for want of patentability, and was invalid. This did not open the whole question of patentability and validity arising on all the evidence in the case, but only so far as it arose out of this comparison between the Rue patent and the Hancock patent, so that the question is a narrow one, and involves simply a comparison between the inventions secured by these two patents. The patent to Hancock, which is the subject of the suit, after describing the previous forms of apparatus for the purpose of injecting water into the steam-boilers by means of the steam, in the specifications makes this statement:

"When steam is substituted for water as the motor in such apparatus, it is evident that the heat in contact with the shorter tube will cause the inclosed or enveloping matter to become of a higher temperature as it advances towards the point where the motor can first act upon it, and thereby the motor becomes less effective than it would be were there a greater difference in temperature between the two; that is, the motor and the body or liquid to be acted upon."

This describes a defect which had been presented to the minds of previous patentees. The injector consisted of two tubes placed axially in a line with each other, through one of which the steam was suffered to enter, and which penetrated into the chamber, which was filled with water drawn from another source, for the purpose of propelling that water through the second tube into the boiler; and the difficulty foreshadowed in this connection, and which had been presented to the minds of previous patentees, was that the steam-tube was projected into the water-chamber to such an extent as that the jet of steam was subject to condensation, and so to a diminution of

its propelling or motive power to drive this water through the other tube into the boiler. In one case, Barclay's patent, the inventor sought to obviate that difficulty by packing his steam-tube with a casing of non-conducting material, such as asbestos.

Now the statement in Hancock's specification shows that what was present in his mind was the difficulty arising in the operation of this apparatus from two bodies—the steam, which was the motive power, and the water, which was the thing to be moved—coming prematurely into such contact as to diminish the motive power of the steam to condense or to carry the body where it ought to be propelled through the other tube into the boiler. Therefore he had presented to his mind the method of constructing some arrangement in this apparatus by which the temperature in the two bodies would be kept as far as possible from each other; the heat in the steam to be preserved, and the water to be kept cold. He therefore goes on to say: "The principal change which I made in the ancient apparatus is at this point, and it consists in substituting a plate with an orifice for the tube,"—that is, the tube intended for the introduction of one of the two elements,—“and some simple but essential changes which will now be described.” He then proceeds to describe what is exhibited in the drawings connected with his patent; the arrangement of the plate with the orifice, called a plug, with the tube through which the steam propels the water into the boiler, (of course, these two were to be used for the purpose indicated,) with the means of holding the water which is drawn into it for the purpose of being propelled through the second of these tubes. The construction given to the patent was that it was a combination of those two elements, of course to be used for the purpose indicated, and implying the existence of this water-chamber; so that the objection taken that the water-chamber is not mentioned as one of the necessary elements of the combination is not before us, inasmuch as it was passed upon before by the court in construing this patent.

Now, there is nothing in the patent of Rue, so far as the specifications and claims are concerned, which suggests the idea which is contained in the patent of Hancock. His patent was for a totally different invention. But the argument is that his drawings exhibit, in point of fact, the very device which constitutes the change indicated by Hancock in his patent as the point intended to be covered by it, viz., a shortening, a withdrawing of the projection attached to the stem of the pipe so as to prevent its immersion in the water chamber except to the minimum amount; and although it is admitted that in those drawings the projection is shown to be longer than in Hancock's, yet that is only a question of degree, and the idea of overcoming the defect in that way having been suggested in the Rue patent, the increased efficiency to be attained by a diminution of the projection of the steam-tube into the water chamber was only a question of mechanical skill, and I think we are both of the opinion (and

that is admitted by counsel upon the other side) that, if that were the only difference between the invention shown in the drawings connected with the Rue patent and the patent of Hancock, the argument would be well taken, and that is, that adopting the idea contained in a former patent, and, merely by a contraction of the parts, increasing the efficiency in pursuance of some suggestion, would not be an invention; but we are of opinion that Hancock's patent goes beyond that, and that is the precise difference between counsel. It is claimed on the part of the defendant that it is the sole difference. It is claimed on the other side that it is not the sole difference, but that the difference consists, not in the mere withdrawal of the nozzle of the steam-tube from the water-chamber by contracting it, by diminishing its length, by cutting it off, but it is by a removal of the water-chamber from its position, which it occupied in the previous devices as being contained between the two tubes equally, so that the water-chamber, being pushed further from the steam-tube, incloses and envelopes the mixing-tube where the steam and water combine, and thus serves, not only the purpose of preventing the condensation which would occur by its contact with the steam-tube, and so diminishing the power and effect of the steam-jet, but promotes the rapid condensation which does take place there, and which it is intended to carry out there, and which, by a more rapid creation of the vacuum promoted by the steam, permits the rush of water into the mixing-tube, and so gives greater vigor to the effect of the jet of steam. So it operates in a double way, by withdrawing its cooling effect upon the steam-jet and transferring it to the other tube, where it ought to be. We think there is a sufficiently clear and explicit description of the arrangement of those devices contained in the Hancock patent to distinguish it from all patents previously obtained, including that of Rue, and that the combination has no reference especially to the greater or less length of the nozzle of the steam-tube, but to the arrangement of the tubes in connection with the water-chamber so as to bring that chamber opposite to and inclosing the tube where the steam and water mix, and the steam is condensed, and away from the other. We are clear in this opinion. Judge Brown coinciding in it, (it being his original opinion,) and as he has heard nothing in the argument tending to shake his conviction, the original decree is affirmed, and will be entered.

BROWN, J. Counsel will recollect that on the original hearing of this case the argument covered a much larger field than the rehearing, involving questions not only as to the validity of the patent upon its face, and its probable anticipation by the Rue patent, but questions as to the regularity of the proceedings in the patent-office; and while, of course, I considered all these points in delivering the original opinion, I must say that upon the application for a rehearing, where all the stress was laid upon one point, I was somewhat shaken

in my previous convictions. At the same time, if the question had been reargued before myself alone, I should have affirmed the original decree, upon the ground that a rehearing before the same judge will not be granted unless he is clearly of opinion that he was mistaken in his original judgment; hence I thought it a proper case to call upon the circuit justice to resolve my doubts. I am entirely content, upon the rehearing, with the opinion originally announced. I confess I am not able, speaking as one who is not practically acquainted with mechanics and machinery, to see the great benefit of this apparatus over the other, the improvement being largely in the shortening of the tube; at the same time, the burden of proving that is upon the defendant, and it is a burden which I apprehend would be a pretty difficult one to carry, in view of the large sales made by the plaintiff in this suit, and the adoption by the defendant of this device in preference to all others. I think that is very strong evidence that there must be a superiority, in the minds of experienced engineers, in the Hancock patent, and I think there is, in respect to its mechanism and the details mentioned by the circuit justice, quite a marked distinction between it and the Rue patent.

NEILL and another v. THE FRANCIS, etc.

(District Court, S. D. New York. September 20, 1884.)

1. MARITIME LIEN—SUPPLIES—FOREIGN PORT—CHARTERER.

Where the charterer of the steamer F. for the "centennial season," not being master, applied in person to coal dealers in Philadelphia for coal, upon her first trip thither from Bridgeport, Connecticut, stating that he had a charter for the season, and directed the coal to be billed to him, and gave in payment his check on a Bridgeport bank, stating that it was not then good, but he thought it would be when presented, and no reference was made to the vessel as a source of credit, and there was no inquiry made of the master or dealing with him, or with any other officer or agent of the ship, and the charterer had, by the terms of the charter-party, agreed to pay for all such supplies, *held*, that the circumstances indicated to the libelants that the application for coal was upon the charterer's credit only, and that, in furnishing the coal thereupon without any dissent or reference to the credit of the ship, or inquiry of the master, the libelants must be held to have acquiesced in trusting to the charterer only, and that the ship was not bound.

2. SAME—PERSONAL CREDIT.

In dealing with a known charterer in a foreign port for mere ordinary supplies, the dealings are *prima facie* upon his personal credit only. *Semble*, no sound legal or commercial reason exists why such dealings, not being a case of actual necessity or distress, should not be held subject to the precise limitations in the charter of which the material-man has, or is affected with, knowledge.

In Admiralty.

Huntley & Bower, for libelants.

William P. Dixon, for claimants.

BROWN, J. This libel was filed to recover \$292.50, the price of 65 tons of coal supplied to the steamer Francis at Philadelphia on May 17, 1876. The general owners, the Providence & Stonington Steamship Company of Rhode Island, appear as claimants of the steamer, and deny that any lien was acquired upon the vessel.

The proof shows that in the spring of 1876 the claimants chartered the steamer to one H. M. Hoyt, of Bridgeport, Connecticut, to run as an excursion steamer between Bridgeport and Philadelphia during the centennial season; that the captain of the steamer was designated by the claimants, but that he was to be in the employ and pay of the charterer, who had exclusive possession, control, and management of the steamer during the term for which she was hired; that the charter contained a further clause providing that the charterer should "provide and pay for all the coal, fuel, pilotages, and all other charges whatsoever;" that Hoyt took possession of the steamer under the charter, accompanied her to Philadelphia, and applied to one Ziegler for coal, informing him of the charter; that Ziegler, being a retail dealer only, was unable to obtain the drawback allowed to wholesale dealers, and thereupon introduced Hoyt to the libelants, who were wholesale dealers, and who, by shipping coal on board under a bill of lading, could procure and allow to Hoyt a certain drawback upon the price; that Hoyt told the libelants, when making arrangement for the coal, that he had chartered the Francis to run between Bridgeport and Philadelphia, during the centennial season, and wanted coal for her; that at the same time he told the libelants "to make out the bills to him," which was done, and that he gave to the libelants his check for the amount, drawn upon a bank at Bridgeport, telling them that the check was not then good, but that he thought it would be good by the time it was presented. Nothing was said between Hoyt and the libelants as to any credit of the ship. Hoyt received from the libelants an order on the Reading Railroad Company for delivery of coal at Richmond, some two or three miles up the river, and the steamer went there and took it aboard, giving a bill of lading therefor, upon which the usual drawback was allowed.

There is no evidence in regard to the credit of Hoyt in Philadelphia. He was not before known to the libelants. The coal does not appear to have been charged to the ship, but was billed to Hoyt only, in accordance with his directions. One of the libelants, however, testified that they would not have sold, on the credit of Hoyt only, if they had not supposed they had a lien on the vessel. It is not testified that anything was said by either about any credit of the vessel, but it is clear that the coal was directed by Hoyt to be billed to him. Neither the captain nor any other officer of the ship took any part in the purchase of the coal. The captain testified that he notified Ziegler, who came aboard the vessel, that the steamer was not to be liable for any supplies; Ziegler, however, denies this. It is probable that the captain's notice was to some other person. The

check, on presentment, was protested for non-payment, and this libel was subsequently filed in September following.

The above facts present a case in most respects similar to that of *Stephenson v. The Francis*, 21 FED. REP. 715, in which I have recently held that no lien was acquired. The bill of lading, in this case, was a mere form adopted to procure the drawback, and has no bearing on the question of lien. In the present case there is not, it is true, the same evidence as in the former, that the captain expressly stated to the libelants that the ship would not be bound; but the libelants were fully informed that Hoyt was the charterer for the centennial season, and having that knowledge they must have understood, as business men, that he was bound to provide and pay for the coal; and that in applying for the coal in person, and in directing it to be billed to him, he was acting in conformity with his obligations to the general owners, and did not intend that the ship should be held; and in supplying the coal without any dissent from Hoyt's proposition, or intimating any claim upon the ship, they must be understood as acquiescing in his proposition, which was, in effect, to furnish the coal on his personal credit only, in conformity with his obligation to the general owner. To my mind, these circumstances, with the giving of the check in payment, and the absence of all reference to the ship as a source of credit, negative any idea that the ship was intended to stand as security, or to be bound for the debt. There is nothing unusual or improbable in such a personal trust for a small bill for so brief a period in the beginning of a season's business. It is the habit of business men, in all branches of trade, to take small risks in this way at the beginning of a season's trade.

I have no doubt that the captain, as he testifies, did notify some one who came on board in reference to the coal that the ship would not be bound. He was nominated by the claimants to look after their interests; and it was his duty to give such notices to persons furnishing ordinary supplies to the steamer. The only reason why the libelants were not so notified expressly, was that they did not deal with the ship or her captain, but with the charterer away from the ship. This furnishes an additional reason why, in the absence of all reference to the ship as a source of credit, the libelants should be held *prima facie* to be dealing with the special owner on his own responsibility only, as I have previously held. The knowledge, moreover, that he had chartered the ship for the centennial season, and was himself applying for coal upon his own check, if not of itself sufficient to indicate that he was bound to provide and pay for it, and that he intended to do so without charging the ship, was at least sufficient to put them upon inquiry as to the terms of the charter, and therefore to affect them with knowledge of it; and this knowledge, coupled with the charterer's application for the coal and proposed payment by his own check, must have shown them that no credit of the ship was intended, but the contrary. The libelants could not

reasonably have imagined that the steamer, during this "centennial season," was to be run by the charterer at the ship's expense. The notice to them of the charter, and the charterer's form of application for coal, still further strengthened this natural presumption. Had they designed to secure the credit of the ship, it was their duty, under these circumstances, either to state this to Hoyt, seeing he was clearly proposing his own credit only, or (as in my judgment they ought legally to be held bound to do) to inquire of the captain of the ship, as the person representing the interests of all. In dealing, not with the master, who in a foreign port represents by the marine law the interests of all parties, and presumptively knows the needs of the ship, and its limitations, but with a known charterer only, not being an officer of the ship, and for mere ordinary supplies, there is no sound legal or commercial reason why such dealings, not being a case of actual necessity or distress, should not be held subject to the precise limitations of the charterer's powers as specified by the charter, of which the material-man has, or is affected with, knowledge. All that the captain could do for the protection of the ship was to notify those who dealt with the ship herself through him, or her officers, that she was not to be bound for supplies; and this it must be inferred from his testimony that he did.

In the case previously referred to I held that an owner, though in a foreign port, not being master, in obtaining supplies on his own personal order, without any reference to the ship as a source of credit, does so, *prima facie*, on his own personal credit; that in order to hold the ship the material-man must show either an agreement or some circumstances indicating a common intention to bind the ship. In the present case, not only is no such intention shown, but the circumstances, to my mind, clearly indicate the contrary.

The libel must therefore be dismissed; but, under the circumstances, without costs.

THE NEW HAMPSHIRE.

(District Court, E. D. Michigan. January 12, 1880.)

1. ADMIRALTY JURISDICTION — CONTRACT TO CARRY CARGO AND MAKE SALE — FAILURE TO ACCOUNT—LIABILITY OF VESSEL.

The owner and master of a vessel contracted to carry a cargo to its place of destination, *to sell it*, and return the proceeds to the consignor, less his freight. The master sold the cargo, but did not return or account for the proceeds. *Held*, that the vessel was not liable, and that a court of admiralty had no jurisdiction.

2. SAME—DELIVERY TO NAMED CONSIGNEE.

But if this had been a contract to deliver the cargo to a *consignee already named*, and to collect from him the freight charges and advances, together with the price thereof, and, after deducting the freight, to pay the consignor

the balance, and such a contract were shown to be usual and customary in the trade in which the vessel was engaged, *it seems* the vessel would be liable for the conversion of the money.

In Admiralty. On exceptions to libel for breach of contract.

The libel set forth the shipment, on board the schooner New Hampshire then lying at Presque Isle, and bound to Detroit, of a cargo of cedar posts, which the master, who was also the owner, agreed to carry to Detroit, and there dispose of, and pay the proceeds of the sale to the libelant, for a freight of one dollar and seventy-five cents a cord, to be retained from such proceeds; that the schooner arrived at Detroit with her cargo, which the master sold at five dollars a cord, but has never yet delivered or accounted to the libelant for the proceeds of the same. To this libel claimant excepted for want of jurisdiction.

John C. Donnelly, for libelant.

George E. Halliday, for claimant.

BROWN, J. The gist of the action in this case is the receipt and misappropriation, by the master, of the proceeds of the cargo. As he was owner, as well as master, there can be no doubt that he is liable in some form of action. The real question is whether the contract to carry the posts, to sell them, and return the proceeds, is a single, indivisible contract, and that a maritime one; or whether, in fact, there are not two contracts: one as master to transport the cargo, and one as factor to sell the same, and account for the proceeds. In this case one of these contracts would be clearly maritime, the other not. If it were a simple case of a contract to deliver the cargo to a consignee named, and to collect from him the freight charges and advances, together with the price thereof, and after deducting the freight to pay to the libelant the balance, and such a contract were shown to be usual and customary in the trade in which the vessel was engaged, I should find little difficulty in holding it to be an entire maritime contract, for which the vessel would be liable. This was held to be the law in the case of *The Hardy*, 1 Dill. 460; and also by the learned judge for the districts of Mississippi in the unreported case of *The Emma*. In delivering his opinion in this latter case, Judge HILL drew a distinction between cases where the master of the vessel contracts to deliver goods to the consignees to whom they had been sold, and collect and bring back the price thereof to the shipper upon a C. O. D. bill of lading, and cases where a cargo is delivered to a vessel upon a contract with the master that he shall convey them to some market, and there sell them for the account of the owner, and return the money to the shipper. In the one case the collection of the money is regarded as a mere incident to the carrying and delivery of the cargo; in the other, the master is vested with certain duties as the agent, not of the owner of the vessel, but of the owner of the cargo. This contract to make sale of the cargo is entirely outside his duties as master, and is a service in no sense maritime. I find this dis-

inction sustained by a great weight of authority, although there are two or three cases in which a different conclusion seems to have been reached.

In *Kemp v. Coughtry*, 11 Johns. 107, the master received a quantity of flour to be carried to New York, and sold in the usual course of such business, for the ordinary freight. The flour was sold by the master for cash, and, while the vessel was lying at the dock, the cabin was broken open, and the money stolen out of the master's trunk while he and the crew were absent. It was held that the owners of the vessel were answerable, though no commissions were allowed beyond the freight for the sale of the goods and bringing back the money. But the opinion of this case was apparently put upon the ground that, after the receipt of the money and its deposit, upon the vessel, the master became as much of a common carrier of the money as he had been of the cargo, and stood in the same position as if he had exchanged this cargo for another, and laden it on his vessel to be carried to the original port of departure. It was held that it made no difference whether the return cargo was in money or in goods. It will be observed the breach was not for a failure to account for the proceeds, but for a loss occurring after they were placed on board the vessel.

In the case of *Harrington v. McShane*, 2 Watts, 443, the facts were substantially the same, except that the vessel and money were accidentally burned on the return trip. The court held the vessel liable upon the express ground that she was as much a common carrier of the money upon the return trip as she was of the outward cargo, and drew a distinction between the acts of a master as a common carrier and a factor: "On their arrival at the port of destination, and landing the flour there, this character of common carrier ceased, and the duty of factor commenced. When the flour was sold, and the specific money, the proceeds of sale, separated from other moneys in the defendant's hands and set apart for the plaintiffs, was on its return to them by the same boat, the character of common carrier reattached. The return of the proceeds by the same vessel is within the scope of the receipt, and of the usage of trade as proved, and the freight paid may be deemed to have been fixed with a view to the whole course of the trade, embracing a regard for all the duties of transportation, sale, and return."

In a subsequent case in New York (*Williams v. Nichols*, 13 Wend. 58) the court held that where the master of a vessel is also the consignee of the cargo, he stands in the relation of agent to two distinct principals: in the stowage of the cargo, its safe conveyance, and delivery, he is the agent of the ship-owner; but in its sale and accounting for its proceeds, he is the agent of the consignor; and in such case, where the owner receives only the *freight*, and the master *commissions* upon the sales, and the master neglects to account for the proceeds, an action will not lie against the owner. This case, ex-

cept in the fact that the master received a commission, is directly in point. See, also, *The Waldo*, Davies, 161; 2 Pars. Shipp. 21; *The Robinson*, cited in 1 Brown, Adm. 221; *Peck v. Laughlin*, 21 Alb. Law. J. 94.

In *Emery v. Hersey*, 4 Me. 407, the court held the owner of the vessel liable, as well for the payment of the proceeds to the shipper as for the safe transportation of the goods; it being shown to be the usual course of business for goods shipped on freight to be consigned to the master for sale and return. This case, however, is practically overruled by *Stone v. Waitt*, 31 Me. 409, in which the court held that in making the sale the master was acting in the distinct character of supercargo. The earlier case is nowhere quoted in the opinion, but I find it difficult to reconcile the two.

In *Moseley v. Reed*, 2 Conn. 389, the master signed a bill of lading with the knowledge and assent of the owner, in which the master was named as the consignee, and it was held obligatory upon the owner, who thereby became the consignee as well as the carrier of the goods, and liable for them to the shipper; but the chief justice, in delivering his opinion, appears to put his conclusion upon the ground that the owner assented to the bill of lading, whereby the master was charged with the responsibility of selling the property and accounting for the proceeds.

While there are some intimations in these common-law cases that would seem to support the theory that, under certain circumstances, the owner might be liable for the acts of the master in selling the goods, there are none of them which decide this point, except the early case in Maine, which is practically overruled by the subsequent case in the same state. The cases of *The Waldo*, *The Emma*, and *The Robinson* are the only ones in which the point seems to have been discussed in the admiralty courts, and all of them are adverse to the position assumed by the libelant here. The case of *Monteith v. Kirkpatrick*, 3 Blatchf. 279, is not in point. I think, upon authority as well as upon reason, the libel does not show a case within the jurisdiction of the court. If it had appeared that the master had received the proceeds of the sale, and taken them aboard the schooner for the purpose of carrying them back to the original port of departure, and in the course of the return voyage they were lost, the liability of a common carrier might be held to reattach; but there is no allegation of this kind in the libel. I think the court has no jurisdiction in the case, for the reason that the contract of the master to sell the goods and account for the proceeds was not maritime.

The libel must therefore be dismissed, but without costs, as the want of jurisdiction appears upon the face of the pleadings.

BRITTON v. THE VENTURE.

(District Court, W. D. Pennsylvania. October Term, 1884.)

ADMIRALTY JURISDICTION—MORTGAGE OF VESSEL FOR PURCHASE MONEY.

A mortgage of a vessel to secure purchase money is not a maritime contract, and a court of admiralty will neither decree a foreclosure thereof nor enforce the mortgagee's right of possession under it.

In Admiralty. *Sur* motion to dismiss libel.

Bird & Porter, for libelant.

Barton & Son, for respondents.

ACHESON, J. It appears by the admissions now of record, and from the copy furnished the court, that the instrument of January 17, 1883, recited in the libel, is nothing more than a mortgage of five-sixteenths of the steam tow-boat *Venture*, to secure the payment of certain promissory notes given for purchase money due the mortgagees upon a sale by them to the mortgagors of shares in the boat. Now it is settled that such mortgage is not a maritime contract, and that a court of admiralty will neither decree a foreclosure thereof nor enforce the right of the mortgagee to possession under it. *Bogart v. The John Jay*, 17 How. 399; *Schuchardt v. Ship Angelique*, 19 How. 239; *The Lottawanna*, 21 Wall. 588. These cases are decisive against the jurisdiction of the court over the controversy here, even did the authorities cited by the libelant's counsel hold a contrary doctrine. But they do not. For example, in the case of *The Martha Washington*, 1 Cliff. 463, there had been a decree of foreclosure, and the absolute title had become vested in the libelant before suit brought.

The motion to dismiss the libel for want of jurisdiction must be allowed. Let such decree be drawn.